CITY OF TRACY'S COMMENTS ON DRAFT NPDES PERMIT
NPDES No. CA0079154

The City of Tracy makes the following comments and requests related to the Draft NPDES permit for its discharge:

1. Pg. 1 – Effective and Expiration Dates. Please note that in accordance with the Memorandum Of Agreement between the U.S. EPA and State Water Board, this permit's effective date should be 50 days after the adoption date. *See* NPDES Memorandum of Agreement between the U.S. Environmental Protection Agency and the California State Water Resources Control Board at 22, section I.F.2.a. (Sept. 22, 1989)(NPDES permits adopted by the Regional Water Board "shall become effective on the 50th day after the date of adoption, if EPA has made no objection to the permit; if there has been significant public comment"). Therefore, the Regional Water Board should ensure that the permit includes a 50-day delay in the effective date, and that expiration date is set for 5 years from the effective date.[1]

Request: Ensure that Effective Date is 50 days after adoption of the Permit, and Expiration Date is 5 or less years after the Effective Date.

2. Pg. 2., Finding II.A. – Permittee. The Draft Permit currently defines the City of Tracy as the "Discharger." The Draft Permit and all accompanying documents (e.g., Fact Sheet, Page F-3 (although that page only defines "Facility," not Discharger) should reference the City of Tracy only as the "Permittee" or the "City," and not as the "Discharger." This would recognize the City of Tracy, like the Regional Water Board, as a branch of government providing a valuable public service to its constituents. The term "Discharger" connotes that nothing of value is being achieved by the City's treatment system prior to discharge. Additionally, this change would be consistent with federal regulations that refer to "the permittee." *See e.g.*, 40 C.F.R. §122.41(a).

Request: Amend Permit to reference "City" or "Permittee" instead of "Discharger."

3. Pg. 5, Finding II.G – WQBELs. The statements included in this finding are incomplete or inaccurate. The first sentence regarding the requirements of 40 C.F.R. §122.44(d) need to be clarified that WQBELs are only required upon a demonstration of a reasonable potential to cause or contribute to an in-stream exceedance of applicable water quality standards. Furthermore, references to "proposed State criteria" should be removed because use of these criteria would constitute underground regulations contrary to State law. The City suggests the following changes to the second sentence of this section: "Where reasonable potential is demonstrated, but numeric water quality standards have not been established for a pollutant, water quality based effluent limitations (WQBELs) may be established: (1) using EPA criteria guidance under CWA section 304(a), supplemented where necessary by other relevant information; (2) on an indicator parameter for the pollutant of concern; or (c) using a calculated numeric criterion, such as a ~~proposed~~ State ~~criterion or~~ policy interpreting the State's narrative criterion, supplemented with other relevant information, as provided in 40 CFR 122.44(d)(1)(vi)."

In the above cases, where non-regulatory numeric values are being used as surrogates for adopted narrative water quality objectives in the derivation of WQBELs, the Regional Board must perform and/or document the analyses required under Sections 13241 and 13242 of the California Water Code to

[1] Alternatively, the City asks for an expiration date of May 15, 2010 and removal of the language in the permit about when the final limits apply and the interim limits expire.

support those numeric values in the Fact Sheet for the permit since such an analysis has never been done on the non-numeric values being utilized in this manner.

Specifically, the Regional Board must demonstrate that the proposed numeric values represent local site-specific water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area. In this demonstration, the regional board must consider environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto, and must consider economics and the need to develop housing in the region. Finally, the regional board must provide a description of the nature of actions which are necessary to achieve the objectives, including recommendations for appropriate action by any entity, public or private. Alternatively, the Regional Board may provide evidence and documentation that such information was considered in the adoption of the water quality control plans for the specific water quality constituent and numeric value in question.

Request: Amend Finding II.G. as suggested and provide requested analysis.

4. Pg. 5, Finding II.G (and Fact Sheet, pg. F-34) – Assimilative Capacity for Mercury. This finding incorrectly states that the Draft TMDL's proposed load allocations and health warnings "confirm there is currently no assimilative capacity for mercury in Old River and applicable water quality standards must be applied as end-of-pipe limitations." Because this finding fails to acknowledge the data addressing water column levels in Old River, this finding is incorrect. As the State Water Board held in the *Tosco* decision (SWRCB Order No. WQ 2001-06), "impairment" determinations, even for bioaccumulative pollutants, are insufficient to decide whether a water body lacks assimilative capacity. Data on water column concentrations of mercury must be assessed to determine whether the level in-stream exceeds the California Toxics Rule criterion of 51 ng/L. If the water column data does not exceed these levels (and based on the Fact Sheet at pg. F-47, para r., they do not – the maximum effluent concentration (MEC) is 18.6 ng/L and the receiving water maximum is 18.1 ng/L and Old River is in compliance with the applicable water quality standard)), then assimilative capacity exists and this finding, as well as the findings in the Fact Sheet at pgs. F-34, and at F-37, para. 3.b., is factually incorrect.

Request: Utilize the applicable mercury objective in the California Toxics Rule, and amend the Draft Permit language to eliminate statements regarding the absence of assimilative capacity for mercury in the Old River.

5. Pg. 5, Finding II.G., Pgs. 10, 12,13, Provision IV.A.1., and Fact Sheet pgs. F-37 to F-55 – Use of Narrative Objectives to Set Permit Limits.

If the Regional Water Board believes that the Basin Plan or California Toxics Rule criteria are not stringent enough to protect beneficial uses, then the appropriate action, in accordance with Section 13241 of the Water Code, is to adopt a new more protective objective through a public process. *See* Basin Plan at pg. III.1.00 ("If a problem is found to occur because, for example, a water quality objective is too weak to protect beneficial uses, the Basin Plan should be amended to make the objective more stringent.)(emphasis added).)

The Regional Water Board cannot override an adopted numeric water quality objective (*e.g.*, the USEPA mercury criterion in the CTR, which was adopted for the protection of human health related to fish consumption) through the interpretation of a narrative objective that is protective of the same use since the CWA requires numeric objectives for toxic pollutants. *See* 33 U.S.C. §1313(c)(2)(B). In

addition, the Regional Water Board cannot rely on narrative objectives indefinitely. Narrative objectives were meant to be merely *interim* measures while the State works to adopt protective numeric objectives. *See* 54 Fed. Reg. 23876, 23877 (1989) ("EPA is promulgating paragraph (vi) as an interim measure to control a pollutant of concern until the state promulgates a water quality criterion for the pollutant.")(emphasis added)). Thus, the Regional Water Board will exceed its authority if it relies on a narrative water quality objective, particularly where ample information has existed to allow the Regional Water Board (or, in this case, the USEPA) to properly adopt a numeric water quality objective to protect the same beneficial use.

In this Draft Permit, the Regional Water Board has relied on numeric criteria guidance documents for such constituents as aluminum, ammonia, chlorine, electrical conductivity (EC), sulfate, and chloride. These numeric values have been available for years in the scientific literature and have been available for consideration in the adoption of numeric water quality objectives. However, the Regional Water Board has inexplicably failed to go through the CWA and Water Code procedures for adopting these criteria as numeric water quality objectives; instead, the Regional Board is seeking to "adopt" these objectives through the NPDES permitting process. Such a failure unlawfully bypasses the statutory requirement for numeric criteria, and the mandatory public participation requirements under federal and state law. 33 U.S.C. §1313(c)(2) and §1313(e)(2)(F); 40 C.F.R. §131.6(e); Water Code §13240-13245.

Moreover, the State Water Board, in a previous precedential order, has held "40 C.F.R. Section 131.11 and Section 303(c)(2)(B) of the Clean Water Act require the adoption of numeric water quality-based objectives" even in an instance where the Basin Plan contained a narrative water quality objective for toxicity. *In the Matter of the Petition of Citizens for a Better Environment (CBE), et al, United States Fish and Wildlife Service (USFWS), and City of San Jose*, SWRCB Order No. WQ 90-5, 1990 Cal. ENV LEXIS 26 at 77 (October 4, 1990). The State Board recognized that "Congress enacted the Water Quality Act of 1987, amending the Clean Water Act. These amendments, as explained previously, added Section 303(c)(2)(B) to the Clean Water Act. This section requires the states to adopt, by February 1990, [objectives] for all priority pollutants for which EPA has adopted [CWA 304(a)] criteria, where the discharge or presence of these pollutants could reasonably be expected to interfere with designated beneficial uses." *Id.* at 75.

5. Pg. 6, Finding II.H., and Fact Sheet Pg. F-9, Section II.A.1. – Beneficial Uses in Old River. This table should reflect the designated beneficial uses of Old River, not just the Delta. The Basin Plan specifically caveats the designations for the Delta by stating that "beneficial uses vary throughout the Delta and will be evaluated on a case-by case basis." *See* Basin Plan at Table II-1, footnote 8. There is no evidence in the permit that this case-by-case evaluation has been completed. Furthermore, the Basin Plan (and federal law at 33 U.S.C. §1313(c)(1)) requires that beneficial use designations be reviewed at least once during each three-year period for the purpose of modification as appropriate. *See* Basin Plan at pg. II-1.00 (*citing* 40 CFR §131.20) and pg. III.1.00. No evidence was included in the permit or Fact Sheet to demonstrate that the Regional Water Board has complied with these legal requirements for triennial review of the Basin Plan.

Request: Perform a case-by-case analysis of the beneficial uses of Old River as required by the Basin Plan before assuming that such uses are existing in Old River.

6. Pg. 7, Finding II.I – California Toxics Rule. In order to be factually correct, this section at the top of page 7 should be amended to read as follows: "…adopted the CTR, which adopted many new water quality criteria and also incorporated some of the NTR criteria that were applicable in California."

Request: Clarify language related to CTR objectives.

7. Pg. 7, Finding II.K. – Compliance Schedules and Interim Requirements. This paragraph fails to identify the Basin Plan's independent authority for compliance schedules. *See* Basin Plan at pg. III-2.00 ("Where the Regional Water Board determines it is infeasible for a discharger to immediately comply with such objectives or criteria, compliance shall be achieved in the shortest practicable period of time (determined by the Regional Water Board), not to exceed ten years after the adoption of applicable objectives or criteria. This policy shall apply to water quality objectives and water quality criteria adopted after the effective date of this amendment to the Basin Plan [25 September 1995].") Many, if not all of the objectives for which interim effluent limits apply would fall under this Basin Plan compliance schedule authority instead of the SIP's authority. These interim limits should be included in the permit, not in a separate TSO. Inclusion in the permit is authorized because the Regional Board is making a new interpretation of a previously adopted objective and such an interpretation would allow for the implementation of the 10-year compliance schedule notwithstanding the fact that the underlying objective was adopted prior to September 25, 1995.

The State Water Board and Regional Water Board for the San Francisco Region, in another case, successfully argued that a Regional Water Board's reinterpretation of a narrative objective "represents a newly adopted standard" for which a compliance schedule could attach. *See* Water Boards' Opposition to Petition for Writ of Mandate in *Communities for a Better Environment, et al. v. State Water Resources Control Board, et al.*, San Francisco Superior Court Case No. 319575, at 15 lines 18-20 (filed Jan. 9, 2004) (excerpt attached as Exhibit A); *see also* EPA Letter at Exhibit P.

The State Board took a broad and more pragmatic view than the Central Valley Regional Water Board is using in the proposed permit for the City of Tracy, and reasoned that the language of the 1995 basin plan (which parallels the language in the Central Valley Basin Plan) "can reasonably be construed to authorize compliance schedules for new interpretations of existing standards." In reaching its conclusion, the State Board relied on the EPA's 1994 *Whole Effluent Toxicity (WET) Control Policy* (WET Policy). The WET Policy expresses what the trial court called "EPA's long-held position that compliance schedules are authorized under the CWA where the State adopts a new or revised interpretation of an existing water quality standard, and where the applicable State water quality standards expressly allow for compliance schedules." In that case, three separate administrative agencies (the San Francisco Regional Board, the State Water Board, and the EPA) approved the schedule of compliance, which was imposed based on the State's **interpretation** of the 1995 basin plan. Moreover, the Court of Appeals held that the trial court properly upheld the State Board's conclusion that the 1995 basin plan authorizes the schedule of compliance to be including within the amended NPDES permit. *Communities for a Better Environment v. State Water Resources Control Board*, 34 Cal.Rptr.3d 396, 410 (2005).

Based on this binding precedent, the Regional Water Board must remove all interim limits from the TSO that are based on new interpretations of pre-existing narrative objectives and place those in the permit itself.[2] Without compliance schedules and interim limits in the Permit, the City may immediately be out of compliance through no fault of its own with the final limits in the Permit and in severe civil and

[2] The doctrine of judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, prevents the Water Boards from taking such wholly inconsistent positions in separate proceedings. Judicial estoppel is "intended to protect against a litigant playing fast and loose with the courts." (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181.) "It seems patently wrong to allow a [party] to abuse the judicial process by first [advocating] one position, and later, if it becomes beneficial, to assert the opposite." (*Id.*) (citations omitted.) The Water Boards cannot have it both ways. The Water Boards' own argument that reinterpreted narrative objectives are new standards or objectives should be accepted and applied uniformly.

criminal enforcement jeopardy on the date that the Permit becomes effective. *See Citizens for a Better Environment-California v. Union Oil* (9th Cir. 1996) 83 F.3d 1111, 1119 (finding a separate cease and desist order extending the compliance schedule did not suspend limits and deadlines in the permit, thereby allowing a citizen suit to proceed against the discharger for failure to comply with the terms of the permit).

Request: Reference the Basin Plan's compliance schedule authority and incorporate interim limits based on new interpretation of narrative objectives into the permit.

8. Pg. 7, Finding II.L. – Alaska Rule. The Clean Water Act requires States to adopt "applicable water quality standards," consisting of designated beneficial uses of waters and water quality criteria/objectives set to protect these uses. (33 U.S.C. §§1313(c)(2)(A); 40 C.F.R. §§131.10 and 131.11). After being adopted by the State, these standards must be approved by the EPA before deemed to be "applicable federal water quality standards" enforceable under the Clean Water Act. (33 U.S.C. §1313(c)(3)*; Alaska Clean Water Alliance v. Clark*, No. C96-1762R, 1997 W.L. 446499 at *3 (W.D. Wash. 1997)(overturning a previous EPA regulation presuming approval of state water quality standards if not approved by EPA within statutory timeframe, and holding that "Congress did not intend new or revised state standards to be effective until after U.S. EPA had reviewed and approved them.").

A federal regulation called the "Alaska Rule" was adopted by U.S. EPA in March of 2000 to address the *Alaska Clean Water* case referenced above. This rule does not apply in this case because the rule did not take effect until *after* EPA had issued its May 26, 2000 approval/disapproval decision on the Central Valley Basin Plan. *See* 65 Fed. Reg. 24641 (April 27, 2000)(effective date of regulation was May 30, 2000). For this reason, this inapplicable rule should not be referenced in this permit and this paragraph should be removed.

Request: Remove paragraph discussing the Alaska Rule as this rule is inapplicable.

9. Pg. 7-8, Finding II.M. – Stringency of Requirements for Individual Pollutants. This paragraph is obviously being placed in this Draft Permit in an attempt to address the holding in the California Supreme Court case of *City of Burbank v. State Water Resources Control Board*, 35 Cal. 4th 613 (2005). However, there is no evidence to support the alleged findings contained in this paragraph.

A statement is made that the permit's technology-based pollutant restrictions are no more stringent than required by the CWA. This is an apparent misstatement of fact. The CWA requires POTWs to meet secondary treatment standards as a technology-based requirement. Secondary treatment for BOD and TSS is defined as an average monthly concentration of 30 mg/l. The permit contains average monthly BOD and TSS limits of 10 mg/l (indicative of tertiary treatment), and an interim limit of 20 mg/L. Please revise this finding to state CWA requires POTWs to meet secondary treatment standards as a technology-based requirement and this Draft Permit exceeds those federal requirements, or revise BOD and TSS limits to 30 mg/l. In addition, the referenced Finding II.F. states that the technology-based requirements are more stringent than federal law and, thus, an analysis is being performed of the factors set forth in Water Code section 13241. *See* Draft Permit at Finding II.F. While the Fact Sheet also says that the "Regional Water Board has considered the factors specified in CWC section 13263," such an analysis was not clear from the Fact Sheet. *See* Fact Sheet at pg. F-51. Furthermore, the Fact Sheet lacked evidence to support the findings made in its 13241 analysis. Such findings, without being supported by evidence in the record, are legally insufficient. C.C.P. §1094.5(c); 40 C.F.R. §124.8(b)(4); *Topanga Association for a Scenic Community v. County of Los Angeles*, 11 Cal.3d 506, 515 (1974); *California Edison v. SWRCB*, 116 Cal. App. 751, 761 (4th Dt. 1981); *see also In the Matter of the*

Petition of City and County of San Francisco, et al., State Board Order No. WQ-95-4 at 10 (Sept. 21, 1995).

This paragraph should recognize that the individual effluent limitations being required are in many cases more stringent than required by federal law and a Water Code section 13263/13241 analysis should be conducted in each of those cases. For example, federal law does not require numeric limits (40 C.F.R. §122.44(d) and (k)(3); *Communities for a Better Environment v. State Water Resources Control Board* (2003) 109 Cal. App. 4th 1089, 1104-5; *In the Matter of the Petition of Citizens for a Better Environment, Save San Francisco Bay Association, and Santa Clara Valley Audubon Society*, Order No. WQ 91-03, May 16, 1991), mass limits where objectives and other limits in the permit are concentration-based (40 C.F.R. §122.45(f)(ii)), daily maximum limits where longer term limits (monthly and weekly averages) have not been demonstrated with evidence to be impracticable (40 C.F.R. §122.45(d)(2)), or tertiary treatment requirements (40 C.F.R. Part 133). Each of these requirements are more stringent than required by federal law. Since this newly added paragraph is legally and factually flawed, it should be removed or corrected prior to adoption of the City's final permit.

Request: Remove the paragraph related to stringency of permit limits, or correct that paragraph to recognize that many limits being imposed are more stringent than required by federal law.

10. Pg. 8, Finding II.N., and Fact Sheet Pg. F-10, Section III.A.3. – Antidegradation Policy. This finding is incorrect for several reasons. First, SWRCB Resolution No. 68-16 cannot "incorporate the federal antidegradation policy" since that federal policy was adopted decades after the SWRCB resolution of 1968. In order to be accurate, the statement should read "…State Water Board Resolution 68-16, which ~~incorporates~~ has been deemed to be consistent with the requirements of the federal antidegradation policy," or alternatively, "…State Water Board Resolution 68-16, which ~~incorporates~~ satisfies the federal requirement for adoption of an anti-degradation policy by the State of California." The current language is confusing and inaccurate and should be changed before the final permit is adopted.

In addition, Permit should not contain interpretations of the language from Resolution 68-16. The permit language should either just reference Resolution 68-16, which speaks for itself, or should contain only the precise wording of the federal antidegradation policy and the State non-degradation policy. The sentence "Resolution 68-16 requires the existing quality of waters be maintained unless degradation is justified based on specific findings," which interprets the Resolution, should be removed from the permit.

Request: Amend the paragraph related to Antidegradation Policy to accurately reflect the relationship between this state policy and federal law, and revise the Permit to eliminate imprecise wording of the policy.

11. Pg. 8, Finding II.Q., Pgs. 19-20, Provision VI.A.2., and Fact Sheet, Pg. F-71, Section VII.A. – Standard and Special Provisions. This section states that the federal standard provisions must be included in every NPDES permit. This is not correct. Federal regulation requires that all conditions applicable to NPDES permits shall be incorporated into permits, either expressly or by reference. If incorporated by reference, the permit must provide specific citations to those regulations being incorporated. (40 C.F.R. §122.41). Thus, the permit's statement that all standard provisions in sections 122.41 and 122.42 must be included in the permit is incorrect – only those provisions in section 122.41 *applicable* to the discharge must be included, OR the specific citations can be included by reference, and only those provision of section 122.42 that apply to the discharge category must be included. For

POTWs, only section 122.42(b) would apply. Therefore, this paragraph needs to be amended to reflect the ability to incorporate applicable provisions by reference.

In addition, the Regional Board's special provisions should not duplicate any of the standard provisions and should be truly regional requirements separate and distinct from the federal rules. If duplicate requirements are being incorporated, an argument would exist that the City was in violation of two separate permit provisions even if those provisions were identical. This situation should be avoided by ensuring no duplication occurs.

Duplication currently exists in the Draft Permit. For example, Provision VI.A.2.c. duplicates the federal standard provision at 40 C.F.R. §122.41(a)(1) and Page D-1, Provision D.I.A.2.

Request: The Regional Water Board should ensure no overlapping and duplicative provisions are included in the Standard and Special Provisions prior to the adoption of the final permit.

12. Pg. 9, Discharge Prohibition III.A. – This provision duplicates Discharge Prohibition III.B. and should be clarified to apply only to "treated" wastewater. Untreated wastewater and waste would then be regulated under Discharge Prohibition III.B. Inadequate justification exists for this Discharge Prohibition.

13. Pg. 9, Discharge Prohibition III.B. – This provision should also reference Provision I.H. of Attachment D since both bypass and upset should apply as exceptions. This provision as well as the preceding one is inconsistent with Provision VI.C.5., which essentially requires that the City take all necessary steps to properly operate and maintain its collection system to prevent overflows. Since sewer spills cannot be completely eliminated and because the proposed permit sets up a process for the City to address and attempt to prevent the causes of overflows, this prohibition is inadequately justified, unreasonable and unnecessary.

14. Pg. 9, Discharge Prohibition III.D. – Inadequate justification exists for this Discharge Prohibition as the Basin Plan does not explicitly authorize such provisions, and this provision is too vague to be enforceable. The permit does not define what would constitute "amounts that significantly diminish the system's capability to comply with this Order." Instead, if this provision is retained, it should state "The ~~Discharger~~Permittee shall prohibit ~~shall not allow~~ pollutant-free wastewater ~~to be~~ from being discharged …" A City can take affirmative steps to enact a prohibition of such discharges, but may be unable to keep from allowing such discharges to occur given that many of these discharges may be illicit or effectively concealed. For these reasons, this provision should be amended or removed.

Request: Remove or clarify the Discharge Prohibitions as requested.

15. Pgs. 10, 12, 13, Effluent Limitations and Discharge Specifications, Provision IV.A.1. – Flow Limits. The permit should merely reference the dry weather design flow and peak wet weather flows in the Findings of the permit or in some other section of the provisions of the Draft Permit and not include these maximum design flows as effluent limits. By imposing flow caps as effluent limits, the Regional Water Board will be subjecting the City to mandatory minimum penalties (MMPs) for exceeding flows. The City hopes that this was not the Regional Water Board's intent.

Furthermore, by including concentration limits, mass limits, and flow limits, it would be possible for the City to violate all three limits merely by having extraordinary flows. Presumably, this was also not the intent. If flow limits are not removed, then the mass limits should be removed because an implicit mass limit is included whenever a flow limit is imposed since mass limits are merely a mathematical calculation of flow times concentration (see footnote 1 to each of the referenced tables).[3]

Request: Remove the effluent limitations for flow, and merely reference design flow capacities in the Findings or in some other section of the Permit's Provisions.

16. Pgs. 10-16, Provision IV. A.1. and A.2. – Mass Limits. The Draft Permit and Fact Sheet fail to state that "40 C.F.R. §122.45(f)(1) requires that, except under certain circumstances, all permit limits, standards, or prohibitions be expressed in terms of mass units." Thus, the Draft Permit ignores that one of those enumerated circumstances is "when the applicable standards and limitations are expressed in terms of other units of measurement" (*e.g.*, concentration). *See* 40 C.F.R. §122.45(f)(1)(ii).

Notwithstanding the fact that the standards and limits for all of the constituents are expressed in the Basin Plan and California Toxics Rule as concentration, the Draft Permit includes more than just concentration limits. The Draft Permit does not independently justify the need for these mass limits in addition to the concentration limits because the Regional Water Board is merely following a non-regulatory template provided by the State Water Resources Control Board that also includes mass limits without explanation.[4] However, the Fact Sheet does not contain any evidence that the City is not using proper treatment or that the City is diluting or has the ability to dilute its effluent.[5] Furthermore, no independent justification for these mass limits as proposed exists as these limits are just alternative mathematical expressions of the concentration value. *See* footnote 3. No evidence has been provided in the tentative Order or Fact Sheet to demonstrate that mass limits are required or necessary for any water quality management purpose.

In addition, the Draft Permit unreasonably limits the mass to average dry weather flows. Although the permit expressly recognizes that the peak wet weather flows may be more than double the dry weather flow, the mass limits do not reflect this fact and are set based on dry weather flows alone. This should be corrected, or the permit should specify, as is done in other regions, that the mass limits do not apply

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[3] A mass limit is merely a calculation of the flow multiplied by each concentration limit (and by a standardizing translation factor to pounds per day of 8.34). For example, the monthly average concentration limit proposed for BOD is 10 mg/L. If one multiplies this number by 9 mgd, and the result from that calculation by 8.34, the prescribed mass limit of 751 lbs./day is derived. Therefore, the proposed flow and mass limits are simply duplicative, and represent an abuse of discretion where not demonstrated to be necessary.

[4] In fact, the Permit itself is unclear as to what is being required since the term "Daily Discharge" is defined as either: (1) the total mass of the constituent discharged over the calendar day (12:00 am through 11:59 pm) or any 24-hour period that reasonably represents a calendar day for purposes of sampling (as specified in the permit), for a constituent with limitations expressed in units of mass **or;** (2) the unweighted arithmetic mean measurement of the constituent over the day for a constituent with limitations expressed in other units of measurement (e.g., concentration). *See* Appendix A at A-1.

[5] Mass limits cannot be justified as a way to prohibit dilution from being used as a method for permit compliance or in order to ensure proper operation of the plant. Such a similar requirement already exists in the federal regulations, incorporated by reference into the permit and Standard Provisions as follows: "The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit." *See* 40 C.F.R. §122.41(e); *see also* Draft Permit at Provision VI.A.1., and Standard Provisions, Attachment D, pg. D-1, Provision I.D.

in wet weather. *See e.g.*, Order Nos. R4-2002-0123 at pg. 26, fn. 3 ("During wet weather storm events in which flow exceeds the design capacity, the mass discharge rate limitations shall not apply, and concentration limitations will provide the only applicable effluent limitations.") This requirement found in many permits in the Los Angeles Region has never been vetoed by U.S. EPA or challenged by any third party. If unchanged, the City would be in violation of its mass limits any time that the dry weather flows are exceeded, notwithstanding continued compliance with the concentration limits and the allowable peak wet weather flow limits.

REQUEST: Remove all proposed mass limits because no evidence exists to demonstrate an independent justification or water quality purpose for these limits, and because these limits are unreasonably restricted to dry weather flow caps.

17. Pgs. 10-16, Provision IV. A.1. and A.2. –Limits Other than Monthly and Weekly Averages. NPDES regulations at 40 C.F.R. 122.45(d) require that all permit limits for POTWs be expressed, unless impracticable, as both average monthly and average weekly effluent limits (AMEL and AWEL). *See* 40 C.F.R. §122.45(d)(2). The impracticability analysis required by 40 C.F.R. §122.45(d)(2) must be done on each individual effluent limit. However, the Regional Water Board has not performed this analysis at all. As such, the Regional Board must analyze each constituent for impracticability of monthly and weekly average limits prior to imposing any daily and/or instantaneous maxima limits.

In addition, case law applies this rule to all constituents, even those that have the ability to be acutely toxic. In the case of *City of Ames, Iowa*, EPA Environmental Appeals Board, NPDES Appeal No. 94-6 (Apr. 4, 1996), EPA contended that a maximum daily limit for ammonia may be imposed because it is impracticable to meet water quality standards by using an average weekly limit. The hearing officer determined that EPA's contention was not well founded, as it *is* practicable to meet water quality standards using an average weekly limit for ammonia. The decision stated that this issue of fact was relevant to the pertinent decision in that the use of the maximum daily limit in the NPDES permit may have the effect of unreasonably increasing the risk of non-compliance with a resulting substantial increase in operating costs to avoid non-compliance. The hearing officer determined, "as the regulation makes clear, the Regional Administrator does not have unlimited discretion to include daily limits; maximum daily limits may be included in a permit for a POTW only if weekly average limits are impracticable." On remand, the Regional Administrator was directed to reconsider the factual issue of whether it would be practicable to state the effluent limitations as weekly and month averages. If it would be practicable, then such averages were to be included in the permit and the daily maximum and instantaneous limits should be removed and replaced with weekly averages. This decision is binding upon EPA Region IX, and thus its delegated state agencies.

Similar state law decisions are binding upon the Regional Board. See *City of Los Angeles v. SWRCB and LA Regional Board*, Los Angeles Superior Court, Case No. 060957 at 12-13 (Apr. 4, 2001) (daily max issue not appealed by SWRCB or LA Regional Board, and therefore is binding on the Boards); *Burbank v. State Water Resources Control Board et al*, 35 Cal.4th 613, 623, n.6 (April 4, 2005 (made final upon denial of rehearing on June 29, 2005)("Unchallenged on appeal and thus not affected by our decision are the trial court's rulings that . . . (3) the permits improperly imposed daily maximum limits rather than weekly or monthly averages".); *In the Matter of East Bay MUD*, State Board Order No. WQO 2002-0012 at pg. 21.

For these reasons, any alleged authorization of daily or instantaneous maximum limitations for POTWs without the requisite impracticability analysis must fail as inconsistent with federal requirements. See

Water Code §13372 (requiring state program to be consistent with federal requirements under the CWA). As such, the Regional Board must remove all daily and instantaneous maximum final effluent limitations unless and until the Regional Board conducts an individualized analysis of each constituent and provides evidence in the record of impracticability as to each limit. *See supra City of Woodland v. RWQCB and SWRCB, Order Granting Writ of Administrative Mandamus* at pg. 20, excerpts attached at Exhibit B.

Furthermore, some of the daily or instantaneous maximum limits included in the Draft Permit may be related to objectives set for long-term human health protection (*e.g.,* designed to provide protection for 70 years of exposure, not for acute effects) or for long-term water use concerns (*e.g.,* laundry discoloration affects of iron or manganese). The limits for these constituents would be adequately regulated by monthly averages alone since there is no evidence that these human health-based limits are impracticable to apply as monthly or even longer (*i.e.,* annual) averages.

The Regional Board appears to believe that the averaging periods for the objectives and the averaging periods for the effluent limits need to be identical, but this is not the case. The effluent limitations must merely protect the beneficial uses and not cause the receiving water to exceed the applicable water quality objectives. Longer term average effluent limits may be applied yet still meet a shorter term average objectives in the receiving water.

REQUEST: Remove all daily and instantaneous maximum effluent limitations for all constituents that have not been demonstrated with evidence in the record to be impracticable. Without such an analysis, all limits should be expressed as AMELs or AWELs.

18. Pgs. 10, 12, 13, and 15, Provisions IV.A.1. and A.2. – Limits for BOD and TSS. The Draft Permit includes not only concentration-based effluent limitations not required by federal law, but also mass and daily limits more stringent than required by federal law. Federal law requires secondary treatment, which equates to 30 mg/L and 45 mg/L of BOD and TSS as a monthly and weekly average, respectively. 40 C.F.R. §133.102(a)(1) and (2), and (b)(1) and (2). None of the limits proposed in the City's Draft Permit equate to secondary treatment requirements, not even those required as interim limits while the City completes its tertiary treatment facilities. Instead, the permit requires 20 mg/L, 40 mg/L, and 50 mg/L as monthly average, weekly average, and daily maximum interim effluent limits and corresponding mass limits based on 9 mgd dry weather flows. These should be amended to reflect secondary treatment requirements of 30 mg/L and 45 mg/L of BOD and TSS as a monthly and weekly average with no corresponding mass limits since such limits are not prescribed by 40 C.F.R. Part 133.

The final limits are purportedly based on the technological capabilities of tertiary treatment or its equivalent. However, these limits also include daily maximum limits and mass limits based on dry weather flow, which are not even discussed in the permit and are not justified as being necessary.[6] The only discussion is of the effluent limits for BOD and TSS "at 10 mg/L, as a 30-day average, which is technically based on the capability of a tertiary system." *See* Fact Sheet, Attachment F, pg. F-22, para. B.2. As such, the final limits should only include the concentration limit of 10 mg/L for BOD and TSS as monthly averages.

Request: Include interim limits for BOD and TSS based on secondary treatment requirements of 30 mg/L and 45 mg/l as monthly and weekly averages as prescribed by federal law. Include

[6] In fact, the Fact Sheet does not even reference mass limits at all. *See* Fact Sheet at pgs. F-22 to F-23, Section IV.B., Tables F-2 and F-3. Thus, mass limits for BOD and TSS are not adequately justified and must be removed.

final effluent limit of 10 mg/L for BOD and TSS as a monthly average. These are the only limits justified in the Draft Permit and Fact Sheet and should be the only limits included in the final Permit.

19. Pgs. 10, 12, 13, Provision IV.A.1., and Fact Sheet pgs.F-39 to F-41 – Ammonia Limits. The Draft Permit proposes limits expressed as monthly average and daily maximum limits. The Regional Water Board imposed daily limits without consideration as to whether the weekly average limits were impracticable. *Id.* at 10-11. As stated in paragraph 17 above, the fact that weekly ammonia limits are not impracticable has already been decided by EPA and the Regional Board should be bound by that determination. *City of Ames, Iowa*, EPA Environmental Appeals Board, NPDES Appeal No. 94-6 (Apr. 4, 1996).

The proposed ammonia limits are derived from USEPA 304(a) criteria based on the interpretation of the narrative toxicity objective. There is no analysis that such numbers apply to the site-specific conditions of Old River, and there is no documentation that the CWC Sections 13241 and 13242 requirements were complied with when the narrative objective was adopted, or those factors have changed since the new criteria guidance numbers were altered.

Request: Remove ammonia limits as improperly imposed because based on an unlawfully adopted narrative toxicity objective, because daily maximum limits were not justified with an impracticability analysis, and because ammonia is a toxic pollutant for which numeric objectives are required under the Clean Water Act.

20. Pgs. 10, 12, 13, Provision A.1. and Fact Sheet Pgs. F-48 to F-49 – Nitrogen Limits. The Draft Permit relies upon the Basin Plan's Chemical Constituents objective to prospectively incorporate by reference drinking water Maximum Contaminant Levels (MCLs) contained in Title 22 of the California Code of Regulations. Such incorporation by reference of another agencies' criteria is legally invalid.

On May 10, 1995, the Office of Administrative Law ("OAL") issued its Notice of Approval and Disapproval, and Reasons for Approval and Disapproval of Parts of a Rulemaking Action on the 1994 Basin Plan Amendments (OAL File No. 95-0328-01, attached as Exhibit C). This approval/disapproval decision on the 1994 Basin Plan determined that "[a] prospective incorporation-by-reference (one that automatically incorporates future changes to an incorporated document) is of dubious validity." *Id.* at pg. 10. However, the OAL conditionally approved of the Chemical Constituents language so long as the Regional Board made allegedly "nonsubstantive clarifications" that included the prospective incorporation by reference language. *Id.* at pgs. 3-4.

The Regional Board included the OAL language in the next reprint of the Basin Plan without subsequent public comment or hearing on or State Board approval of these changes in violation of state law. *See* Basin Plan at pg. III-3.00; Water Code §13244 and §13245. Further, the Regional Board failed to comply with Water Code sections 13241 and 13242 in relation to this expansion of the objectives contained in the Basin Plan.

By modifying the Basin Plan's Chemical Constituents objective upon the OAL's request to contain language prospectively incorporating by reference MCLs from the Department of Health Services' drinking water standards to apply as water quality objectives for waters designated MUN without further hearings, the Regional Board abdicated its responsibility to consider the factors contained in Water Code

Code sections 13241 and to develop an implementation plan for these incorporated objectives as required under Water Code section 13242. *See* Memorandum from RWQCB—Central Valley Region, dated 11 May 1995, attached as Exhibit D. This analysis was required when the prospective incorporation language was placed in the Basin Plan, and then each time a new or more stringent MCL is newly incorporated into Title 22.

The use of the prospective, incorporation-by-reference method of adopting water quality objectives for those water bodies designated MUN violates the requirement that affected state and local agencies be consulted with and their concerns be considered, the applicable public notice and participation requirements of the Water Code, and the requirement that changes to a Basin Plan must be approved by the State Board before those changes become effective. *See* Water Code §§13240, 13244, and 13245.

It is very important to note that the Regional Water Board failed to consider the Water Code 13241 factors when this objective was originally established because the Regional Water Board alleged that "there would be no purpose for the Regional Board to consider the same information that has already been considered in an open, public process by DHS." *See* Regional Board Record for the 1994 Basin Plan, RWQCB_21488, attached as Exhibit E.[7] Contrary to findings made by the OAL and Regional Board,[8] deferral of these obligations to the Department of Health Service's (DHS) MCL adoption hearings was inappropriate and unlawful because DHS does not adopt MCLs with the intent and understanding that the MCLs will be used for any other purpose than drinking water standards applied to public water agencies' supply of tap water to the public. The Regional Board applies the MCL values to ambient waters rather than to the tap water regulated by DHS, and the two waters are not comparable. The Safe Drinking Water Act requires that surface waters be extensively treated prior to delivery to customers as tap water. These water treatment processes significantly alter the concentrations of most water quality constituents present in ambient waters. Furthermore, DHS does not notify all dischargers of potential changes to MCLs to provide them with an opportunity to review and comment on proposed changes, and DHS does not comply with the explicit Water Code or CEQA requirements for adoption of Basin Plans and water quality objectives.[9] Therefore, the Regional Board cannot delegate its Basin Planning powers to DHS,[10] and unlawfully relied upon DHS hearings as a substitute for its own mandatory water quality objective-setting procedures. Specifically, in relation to nitrogen limits, the Regional Water Board has improperly imposed the MCLs for the protection of human health for nitrite and nitrate of 1 mg/l and 10 mg/L.

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[7] The City requests that the entire record for the Basin Plan related to the adoption and the amendment of the Chemical Constituents objective be included in the record for this permit, and has included that record, obtained from the Central Valley Regional Board as Exhibit Q. This record demonstrates that the Regional Board failed to consider the mandatory Water Code factors when this objective was adopted and/or amended.

[8] *See* OAL File No. 95-0328-01 at Exhibit B, pg. 12 (OAL approved the prospective incorporation-by-reference of specified standards for drinking water adopted by the Department of Health Services (DHS) for waters designated by the Regional Board as MUN in part because "the public has a continuing opportunity to participate in proposed changes to the drinking water standards.")

[9] Since DHS does not adopt MCLs as water quality objectives, their CEQA analysis does not extend to potential impacts of applying these numbers as water quality objectives to all waters of the State.

[10] The Regional Board's delegation powers only allow delegation of certain activities and only to the Board's Executive Officer. *See* Water Code §13223(a). Delegation of basin planning activities to DHS is not authorized.

The Regional Water Board also improperly states that "Effluent limitations for nitrate and nitrite are required pursuant to CWC section 13263.6(a)." *See* Fact Sheet at pg. F-49. This is incorrect since that statutory provision only applies where "the most recent toxic chemical release data reported to the state emergency response commission pursuant to Section 313 of the Emergency Planning and Community Right to Know Act of 1986 (42 U.S.C. Sec. 11023)" indicate that a particular toxic chemical is discharged into the POTW, for which the Regional Board has established numeric effluent limits and the discharge will have the reasonable potential to exceed that objective. Water Code §13263.6(a). In this case, nitrogen is not a toxic pollutant, and there is no evidence to support the Regional Board's conclusion that this provision applied. In fact, page F-19 of the Fact Sheet at Section III.B.4 states that no effluent limits are included in this permit pursuant to this section. For this reason, the sentence referenced above must be removed from the Permit.

The write up in the Fact Sheet contains no information on nitrogen levels in the effluent or the receiving water, but merely concludes that the new limits may put the City in immediate non-compliance. A discussion of natural or background levels of nitrogen in Old River should be included to determine whether or not the MCLs are even attainable. MCLs apply to treated drinking water, not to surface waters, so those MCL numbers should be merely used as guidelines for effluent limit determinations and not be used as end-of-pipe effluent limitations.

Request: Remove nitrogen limits as improperly imposed based on an unlawfully adopted and/or amended narrative Chemical Constituents objective that improperly prospectively incorporates by reference MCLs adopted by DHS.

21. Pgs. 10, 12, 13, Provision IV.A.1., and Fact Sheet pgs F-38 to F-39 – Aluminum Limits. The proposed effluent limitations for aluminum are not based on numeric water quality objectives, but instead on an interpretation of the narrative toxicity objective. *See* Fact Sheet at pg. F-38. A Superior Court in the case of *Woodland v. SWRCB and CVRWQCB* held that the Regional Water Board

> "failed to consider site specific characteristics of the Tule Canal when applying federal water quality criteria, as required by 33 U.S.C. § 1313(c)(2)(A), 40 C.F.R. § 131.11(b)(1)(ii), and Water Code § 13241 and § 13263(a). Respondents [Central Valley Regional Board and State Water Board] counter that 'it would be illegal under the Clean Water Act' to consider site-specific factors when setting effluent limitations. (Opposition brief at page 15:21 – 16:2). However, Respondents cite no authority for this sweeping assertion, which is contradicted by the authorities cited by the City [of Woodland]. Respondents' Orders must be revised to explicitly address why *any* effluent limitations are reasonably necessary, in light of the site-specific conditions at the Tule Canal, in accordance with § 13000 and § 13377." *See* Court Order at 12 (emphasis added). Later in the decision, the Court reiterated that "As discussed above, Respondents' Orders must be revised to explicitly address why any effluent limitations, including that of aluminum, are reasonably necessary, in light of the site-specific conditions at the Tule Canal, in accordance with § 13000 and § 13377."

See Exhibit B, *Woodland* Court Order at pg. 15 (emphasis added). This decision is binding on the Regional Water Board and the underlying laws cited apply equally to the City of Tracy's Draft Permit. Thus, the Draft Permit must include a review of the site specific characteristics of Old River prior to imposing effluent limits for aluminum based on non-regulatory EPA criteria guidance.

EPA modified the criteria guidance for aluminum in 2002 by expressing the criteria as total recoverable metal in the water column rather than acid soluble, and adding the following footnote to the 87 µg/L chronic criterion:

> "L. There are three **major reasons** why the use of Water-Effects Ratios might be appropriate. (1) The **value of 87 µg/l is based on a toxicity test** with the striped bass **in water with pH = 6.5-6.6 and hardness < 10 mg**/L. Data in "Aluminum Water-Effect Ratio for the 3M Plant Effluent Discharge, Middleway, West Virginia" (May 1994) indicates that **aluminum is substantially less toxic at higher pH and hardness**, but the effects of pH and hardness are not well quantified at this time. (2) In tests with the brook trout at low pH and hardness, effects increased with increasing concentration of total aluminum even though the concentration of dissolved aluminum was constant, indicating that total recoverable is a more appropriate measurement than dissolved, at least when associated with clay particles, which might be less toxic than aluminum associated with aluminum hydroxide. (3) **EPA is aware** of field data indicating than **many high quality waters in the U. S. contain more than 87 ug aluminum/L**, when either total recoverable or dissolved is measured." (emphasis added.)

From the above, it is clear that US EPA itself questions the applicability of the chronic criterion in waters with pH and hardness greater than 6.5 and 10 mg/L, respectively, and for that reason states that the use of Water Effects Ratios (WERs) might be appropriate. These facts are not discussed at all in the Draft Permit in relation to aluminum. The City requests that these facts be added to the Fact Sheet for the Draft Permit.

It is also important to recognize that, as reflected in CTR criteria, hardness levels have a significant impact on toxicity for many other metals (*e.g.*, cadmium, copper, lead, zinc). The guidance footnote itself states that aluminum "will be substantially less toxic at higher pH and hardness." Hardness levels in Old River are substantially higher than 10 mg/L; in fact, the Draft Permit states that the "minimum observed receiving water hardness" is 109 mg/L as $CaCO_3$. *See* Fact Sheet at pg. F-43. Based on these facts, the 2002 criteria guidance document would recommend consideration of local conditions, and adjustment of the criteria based on the pH and hardness of the ambient receiving water. After those adjustments are made, it is likely that the City's effluent would not have reasonable potential and no effluent limit would be required.

Without this change, the reasonable potential analysis was improper because the Regional Water Board presented no analysis of indicator organisms, species diversity, population density, growth anomalies, or biotoxicity test results to support this premise despite the fact that the Basin Plan states: "Compliance with this [narrative toxicity] objective will be determined by analyses of indicator organisms, species diversity, population density, growth anomalies, and biotoxicity tests of appropriate duration or other methods as specified by the Regional Water Board."

Request: Adjust the aluminum guidance criteria to address the site-specific conditions in the Old River, in accordance with 40 C.F.R. § 122.44(d) and Water Code §13000 and § 13377 prior to performing a reasonable potential analysis.

22. Pgs. 10, 12, 13, Provision IV.A.1., and Fact Sheet pgs F-52 to F-54 – Salinity Limits. The Fact Sheet is unclear as to what exact water quality objective is being implemented.[11] The possibilities appear to be the site-specific limits for EC for the South Delta of 700 and 1000 µmhos/cm depending on the season, the incorporated by reference secondary MCLs of 900-1600 µmhos/cm (with 2200 as a short term acceptable level), and a 20 year old, non-regulatory United Nations guidance document number of 700 µmhos/cm used to implement a narrative objective, which is not identified, ostensibly to protect agricultural uses. *See* Exhibit F, United Nations report on Water Quality for Agriculture (1985).

If the City of Tracy is required to meet the proposed EC effluent limit (*i.e.*, an average monthly concentration of 700 µmhos/cm), the City will be compelled to construct and operate a microfiltration/reverse osmosis treatment facility to treat a significant portion of the influent flow. The estimated size of the RO process required to achieve reliable compliance with the proposed effluent limit of 700 µmhos/cm is 10.0 mgd. The estimated capital cost is $134 million. The estimated annual cost of operating a 10 mgd RO facility is $8.5 million per year. This is an increase of **382 percent** in the City's current annual operating budget for its wastewater treatment facilities. Based on the analysis provided below, the City asserts that the imposition of the proposed EC effluent limit and the resulting compliance expense is not reasonable, in that the extraordinary compliance cost is not commensurate with the minimal water quality benefits to be achieved. Additionally, as recognized by the State Water Board and others, the large scale factors influencing EC levels in the South Delta will overwhelm the effects of any efforts by the City to control EC levels in its effluent. In fact, the State Water Board advocates review and revision of the adopted EC objectives in the South Delta to ensure that the objectives are reasonably attainable. As outlined below, the State Water Board has never considered the reduction of EC levels in wastewater effluents in the Delta to be a significant element of an EC management strategy.

Use of a Non-Regulatory Agricultural Goal of 700 µmhos/cm Based on Interpretation of a Narrative Objective

For the reasons provided in paragraph 20 above, the Chemical Constituents objective and the underlying MCLs prospectively incorporated by reference are of dubious legal validity and should not be used as "applicable water quality objectives." The record contains no evidence that the non-regulatory agricultural water quality goal of 700 µmhos/cm is reasonably required to be applied to the Old River area or that salt-sensitive crops grown in the area using Old River as a supply are likely to be impacted based on the manner in which those crops are irrigated, or whether any actual adverse impacts have been registered to confirm the necessity of additional restrictions above and beyond existing levels of EC. These site specific evaluations must be made before using a water quality goal derived based on prevailing conditions in the Middle East, an area with different climactic and hydrological characteristics. *See Own Motion Review of the City of Woodland* State Board Order No. WQO 2004-0010 (April 22, 2004) attached as Exhibit G.

In the *City of Woodland* Order, the State Board determined that when the Regional Board applies narrative objectives, the Regional Board must evaluate whether the specific numerical values used "are relevant and appropriate to the situation at hand." *Id.* Applying an EC value without further study as to

[11] The original text using the word "implement" should be maintained since the Regional Water Board is implementing and interpreting the narrative objectives. *See* Fact Sheet pg. F-53. Since numeric values are not explicitly contained in these narrative objectives, there is nothing to directly apply, the numbers must be determined and derived from other locations (e.g., Drinking water MCLs, agricultural water goals, etc.).

its general applicability, was found by the State Board to be inappropriate. *Id.* at pg. 7. The State Board found that "the true suitability of a given water depends on the specific conditions of use and on the management capability of the user." *Id.* In the *Woodland* case, as is the case here, the specific uses of the waters in question were not studied to determine an appropriately protective EC value given the actual and probable future uses of the waters in question.

The State Board made it clear that guidance numbers for EC (such as the MCLs) "cannot be interpreted as an absolute value." *Id.* Rather, the Regional Board must determine whether site-specific conditions applicable to City's discharge allow some relaxation in the value imposed. *Ibid.*; *see also* Water Code §13263(a). That was not done in this case and must be done before the final permit is adopted.

When a regulation or other statutory interpretation by an administrative agency appears to be erroneous because of subsequent administrative or judicial decisions, it is the agency's duty to conform to the correct interpretation. *See Pacific Motor Transport Co. v. State Board of Equalization*, 28 Cal. App. 3d 230, 242 (1972). Otherwise, the agency would be allowed to function in a manner "wholly unintended by the law." *Id.* Furthermore, the State Board has specifically found that "the treatment of [State Board] decisions and orders as precedent helps provide greater consistency and predictability in agency decision making." *See In the Matter of Fishery Protection and Water Right Issues of Lagunitas Creek*, State Board Order No. WR96-1 at pg. 22, n.11 (1996). For these reasons, and similar to the State Board's *Woodland* Order, the EC limit should be removed until an analysis of the proper number is determined. *See accord* excerpts from Hearing Transcript from U.C. Davis permit attached as Exhibit H (EC limit of 700 µmhos/cm was unanimously removed from that permit).

If an effluent limitation for EC is retained, that limit should be at least 1600 µmhos/cm (i.e., the highest end of the allowable range of MCL values for EC in 22 C.C.R. Table 64449-B). This value should apply year round as at least a 6-month average. *See City of Woodland* permit, R5-2003-0031 at pg. 21 (although EC limit was removed by the State Water Board for the reasons described above, that limit was set as a *6-month average*) attached as Exhibit I. A longer term average limit is appropriate because monthly and weekly average limitations are not practicable given the extraordinary treatment required to meet such limits. 40 C.F.R. §122.45(d)(2); *see also* Exhibit B, *Woodland* Court Order at pg. 20.

Use of the Site-Specific Salinity Objective

The water quality objectives for EC applied by the Regional Water Board are set forth in Table III-5 of the Basin Plan. The footnote to Table III-5 of the Basin Plan explains that the water quality objectives in the table were "taken from the State Water Board's Water Quality Control Plan for Salinity, May 1991." The document referred to in the Basin Plan is the "Water Quality Control Plan for Salinity, San Francisco Bay/Sacramento-San Joaquin Delta Estuary, 91-15 WR, May 1991." (1991 Delta Plan.) The 1991 Delta Plan is one in a series of documents that the State Board has prepared and adopted in its efforts to protect water quality in the Delta area through the coordinated exercise of the State Board's authority over water rights and water quality and is hereby incorporated herein by reference.[12]

[12] The State Board's water quality control plans for the Sacramento/San Joaquin Delta have been based, in part, upon recognition of the interrelationship between water rights and water quality in the complex Delta system. In addition to addressing the effect of water diversions from the Delta and upstream tributaries on water quality in the Delta, the plans discuss the effects that agricultural irrigation return flows have had on the increased discharge of salt to the Delta and Delta tributaries.

Table 1-1 of the 1991 Delta Plan specifies water quality objectives for EC to protect agriculture in the area covered by the plan. The table includes water quality objectives for EC at the Vernalis gage station--and three southern Delta locations--of 0.7 millimhos per centimeter (mmhos/cm) or 700 µmhos/cm from April 1 through August 31, and 1.0 mmhos/cm or 100 µmhos/cm[13] from September 1 through March 31.[14] Although the plan was adopted in 1991, it did not require the EC objectives to be fully implemented until 1996. The table also includes the statement that, if a contract has been negotiated between the Department of Water Resources, the U.S. Bureau of Reclamation, and the South Delta Water Association, that contract will be reviewed prior to implementation of the specified EC standard for the southern Delta, and appropriate revisions will be made to the objectives after considering the needs of other beneficial uses.

Rather than focusing primarily on meeting water quality objectives through regulation of discharges, the 1991 Delta Plan provides "the State Board recognizes that the flow requirements and salinity objectives are largely to be met by the regulation of water flow." (1991 Delta Plan, pg. 2-2.) With respect to reducing the quantity of salt in the southern Delta area, the State Board established a goal of reducing the salt load discharged to the San Joaquin River by at least 10 percent and estimated that goal could be met through increased irrigation efficiency to reduce subsurface drainage. The State Board referred to development of a salt load reduction policy, the goals of which "should be achieved through development of best management practices and waste discharge requirements for non-point source dischargers." (1991 Delta Plan pg. 7-5.)

In May 1995, the State Board adopted a revised water quality control plan for the Delta. ("Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary, 95-1WR, May 1995" (1995 Delta Plan, also incorporated herein by reference).) The 1995 Delta Plan delayed the implementation date for the EC objectives in the southern Delta until December 31, 1997. (1995 Delta Plan, pg. 17, Table 2.) In discussing the implementation program for meeting the southern Delta agricultural salinity objectives, the Plan states:

> "Elevated salinity in the southern Delta is caused by low flows, salts imported in irrigation water by the State and federal water projects, and discharges of land-derived salts primarily from agricultural drainage. Implementation of the objectives will be accomplished through the release of adequate flows to the San Joaquin River and control of saline agricultural drainage to the San Joaquin River and its tributaries.[15] Implementation of the agricultural salinity objectives for the two Old River sites shall be phased in so that compliance with the objectives is achieved by December 31, 1997.
>
> "..... The SWRCB will evaluate implementation measures for the southern Delta agricultural salinity objectives in the water right proceeding." (1995 Delta Plan, pg. 29.)

On March 15, 2000, the State Board adopted Revised Water Right Decision 1641, which once again addresses the relationship between water diversions and implementation of Delta water quality

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13 The effluent limitations for EC in the permit are expressed in µmhos/cm and the water quality objectives for EC in the Basin Plan are expressed in mmhos/cm. (1000 µmhos/cm are equal to 1.0 mmhos/cm.)

14 The values were specified as maximum 30-day running averages of mean daily EC.

15 Water Code section 13242 requires implementation plans for all water quality objectives to identify what entities must undertake activities to come into compliance with the objective.

objectives and determined that "the actions of the CVP are the principal cause of the salinity concentrations exceeding the objectives at Vernalis. *See* Exhibit J, SWRCB Revised Decision 1641 at pg. 83. This State Board decision also states:

> "Water quality in the southern Delta downstream of Vernalis is influenced by San Joaquin River inflow; tidal action; diversions of water by the SWP, CVP, and local water users; agricultural return flows; and channel capacity. (R.T. pg. 3668; DWR 37, pg. 8.) The salinity objectives for the interior southern Delta can be implemented by providing dilution flows, controlling in-Delta discharges of salts, or by using measures that affect circulation in the Delta....
>
> "Even when salinity objectives are met at Vernalis, the interior Delta objectives are sometimes exceeded. (R.T. pg. 3677; SWRCB le, Figures [IX-19]-[IX-26]; SWRCB 76.) Exceedance of the objectives in the interior Delta is in part due to water quality impacts within the Delta from in-Delta irrigation activities. (R.T. pg. 7794.)
>
> "..... In 1987, DWR and SDWA identified flow barriers that could be constructed in the southern Delta to enhance water levels and circulation. The DWR, the USBR and the SDWA have agreed that the salinity problems in the southern Delta can be mitigated using the barrier program.... Since 1991, DWR has been installing and operating temporary barriers to assist SDWA diversions. Permanent barriers are proposed as components of the preferred alternative for the ISDP. (DWR 37.)
>
> "The construction of permanent barriers alone is not expected to result in attainment of the water quality objectives. . . The objectives can be met consistently only by providing more dilution or by treatment. (R.T. pg. 3737.) ... Modeling shows that construction and operation of the temporary barriers should achieve water quality of 1.0 mmhos/cm at the interior stations under most hydrologic conditions.
>
> "The DWR and the USBR are partially responsible for salinity problems in the southern Delta because of hydrologic changes that are caused by export pumping. Therefore, <u>this order amends the export permits of the DWR and of the USBR to require the projects to take actions that will achieve the benefits of the permanent barriers in the southern Delta to help meet the 1995 Bay-Delta Plan's interior Delta salinity objectives by April 1, 2005. Until then, the DWR and the USBR will be required to meet a salinity requirement of 1.0 mmhos/cm [equivalent to 1000 µmhos/cm]. If, after actions are taken to achieve the benefits of barriers, it is determined that it is not feasible to fully implement the objectives, the SWRCB will consider revising the interior Delta salinity objectives when it reviews the 1995 Bay-Delta Plan</u>...." (Revised Water Right Decision 1641, pgs. 86-88, emphasis added.)

Revised Water Right Decision 1641 summarized the State Board's conclusions regarding salinity problems in the southern Delta as follows:

> "..... Salinity problems in the southern Delta result from low flows in the San Joaquin River and discharges of saline drainage water to the river. The actions of the CVP are the principal causes of the salinity concentrations exceeding the objectives at Vernalis. Downstream of Vernalis, salinity is influenced by San Joaquin River inflow, tidal action, diversions of water by the SWP, CVP, and local water users, agricultural return flows, and channel capacity. Measures that affect

> circulation in the Delta, such as barriers, can help improve the salinity concentrations." (Revised Water Right Decision 1641, pg. 89.)

Although the water right decision did not amend the water quality objectives in the 1995 Delta Plan, the decision defines the responsibilities of the Department of Water Resources and the Bureau of Reclamation for implementation of several provisions of the plan, including the southern Delta EC objectives. Footnote 5 to Table 2 of the decision provides that:

> "The 0.7 EC objective [equivalent to 700 µmhos/cm] becomes effective on April 1, 2005. The DWR and USBR shall meet 1.0 EC at these stations year round until April 1, 2005. The 0.7 EC objective is replaced by the 1.0 EC objective from August after April 1, 2005 if permanent barriers are constructed or equivalent measures are implemented in the southern Delta and an operations plan that reasonably protects southern Delta agriculture is prepared by the DWR and the USBR and approved by the Executive Director of the SWRCB. The SWRCB will review the salinity objectives for the southern Delta in the next review of the Bay-Delta objectives following construction of the barriers." (Revised Water Right Decision 1641, pg. 182.)

The most recent State Board action with respect to the EC water quality objectives in the southern Delta was adoption of State Board Resolution No. 2004-0062 on September 30, 2004. The resolution adopted the staff report for the periodic review of the 1995 Delta Plan and affirmed the plan as it currently exists until changed by action of the State Board. In adopting the staff report, the State Board accepted the recommendation to receive further information to help decide whether to amend several provisions of the plan, including the southern Delta EC objectives. The State Board also accepted the staff recommendation to consider amending the Program of Implementation section of the plan as necessary for implementation of any changes to the EC water quality objectives for the southern Delta or other revised objectives. (State Board Resolution No. 2004-0062, pgs. 1 and 2, attached as Exhibit K.)[16]

Review of the documents discussed above leads to several conclusions regarding the southern Delta EC objectives from the 1991 and 1995 Delta Plans and the effluent limitations in the City's permit that are proposed by the Regional Water Board to implement those objectives. First, the lengthy record of prior State Board decisions and water quality control plans for the Delta establishes that the salinity problems in the southern Delta are the result of many inter-related conditions, including water diversions upstream of the Delta, water diversions within the Delta for export and local use, high levels of salinity in irrigation return flows discharged to Delta waterways and tributaries, groundwater inflow, seasonal flow variations, and tidal conditions. Second, although discharge of treated wastewater to the Delta or its tributaries under an NPDES permit can affect EC in the southern Delta, previous State Board decisions and water quality control plans and related environmental documents do not discuss treated effluent discharges as a source of salinity in the southern Delta or consider the environmental, economic, or water quality impacts of using these EC objectives as end-of-pipe effluent limits. Similarly, previously adopted implementation programs for complying with the EC objectives in the southern Delta have focused primarily on providing increased flows and reducing the quantity of salts delivered to the Delta and its tributaries by irrigation return flows and groundwater. The record also establishes that the implementation date for actions to implement the 0.7 mmhos/cm EC objective [equivalent to 700 µmhos/cm] for April through August was repeatedly postponed and that the State Board recently

16 The staff report adopted in State Board Resolution No. 2004-0062 recommended that the State Board not consider changes to the EC objectives upstream of Vernalis and several other provisions of the 1995 Delta Plan at this time. (State Board Resolution No. 2004-0062, pg. 2.)

adopted a report recommending review of southern Delta EC objectives and continues to hold workshops on salinity in the Central Valley, including one scheduled for January 31, 2006. Revised Water Right Decision 1641 places primary responsibility for meeting the EC objectives on the Department of Water Resources and the Bureau of Reclamation, and did not require those agencies to implement the 0.7 mmhos/cm [700 µmhos/cm] EC objective until April 1, 2005.

The City's monitoring reports from July 1998 through December 2004 show that the average EC of its effluent was 1753 µmhos/cm, the lowest monthly average was 1008 µmhos/cm and the highest monthly average was 2410 µmhos/cm for 305 samples. *See* Fact Sheet at pgs. F-53 to F-54. The EC data collected at background receiving water sample locations from July 1998 through November 2003 show that EC in the receiving water averaged 640µmhos/cm in 277 sampling events, which is below the salinity objective of 700 µmhos/cm. *See* Fact Sheet at pg. F-54. The EC levels in the receiving water from 1975 to 1994 ranged from 195 to 2090 µmhos, reflecting numerous exceedances of EC water quality objectives of 700 µmhos/cm and 1000 µmhos/cm and no evidence shows that these exceedances were caused by the City's effluent.

Hourly EC data from the Department of Water Resources' Mossdale monitoring station (RSANO87) in the San Joaquin River located above the point where the Old River exits the San Joaquin River show that, from December 2000 through September 2002, the conductivity of the San Joaquin River ranged from 299 µmhos/cm to 1131 µmhos/cm and averaged 721 µmhos/cm.

The Regional Water Board has not included complete information on historic receiving water conditions for EC in Old River in the record for this permit. While the Fact Sheet states that average level of EC in Old River for the period July 1998 through November 2003 was 640 umhos/cm, it is not demonstrated that a reasonable potential exists for the City's effluent to contribute to a violation of the EC water quality objectives, or that the Regional Board correctly determined that the City's permit should include EC effluent limitations. The Regional Board order does not establish the EC effluent limitation based on the 1995 Delta Plan water quality objectives for EC in the southern Delta, which after April 1, 2005, would be 700 µmhos/cm for April 1 through August 31 and 1000 µmhos/cm for the remaining months. Instead, the Regional Board is using the narrative chemical constituents objective to impose a number lower that the range of values required as secondary MCLs[17] (namely 900 to 1600 µmhos/cm), and imposing a 700 µmhos/cm effluent limit, presumably based on an agricultural water goal derived by the United Nations to protect crops that "are either currently grown in the South Delta or may be grown in the future." Fact Sheet at pg. F-53. The Regional Water Board has provided no evidence to support this allegation, or to demonstrate that the growers of these crops are using water containing City of Tracy effluent, or that the current water quality of the receiving waters (including Tracy's effluent) has caused any adverse effect on the existing or probable future beneficial uses. Without this evidence, the Regional Water Board should not rely on a water quality goal that has never been through the public scrutiny of a water quality objective adoption process as required by the Water Code.

The City relies upon groundwater sources, water from the Delta-Mendota Canal, and some Sierra water for the drinking water it delivers.[18] Based on the review of effluent EC data for the period 1998 through 2004, the average EC level in the City's effluent was 1750 µmhos/cm. The City estimates that while changes in its water supply to increase the percentage of Sierra water in the overall supply will reduce

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[17] *See* Exhibit L, EPA document explaining secondary MCLs as non-enforceable guidelines.

[18] The EC of the Sierra surface water supply is approximately 100 µmhos/cm.

the EC of the effluent it discharges to the river, the average level will still significantly exceed 1000 µmhos/cm. The City estimates that implementation of other source control measures for salinity would not reduce the EC of its effluent to an average level less than 1000 µmhos/cm. [19]

The City contends that the only way it could assure compliance with the proposed 700 µmhos/cm EC effluent limitation in its permit would be through construction and operation of a reverse osmosis water treatment facility. The City estimates that the annual cost of constructing and operating reverse osmosis facilities would be at least $19.2 million. This is in addition to the current operating cost of $8 million per year. The City estimates that compliance with the effluent limitations on EC would result in increasing current City sewer rates from approximately $22.25 per month up to **$85 per month** for single family homes.

The City contends that: (1) assuring compliance with the 700 µmhos/cm EC limitation in the City's permit would require construction and operation of a reverse osmosis treatment plant for a large portion of the City's effluent (10.0 mgd) at a very large cost; and (2) because of the relatively high salinity of the receiving water and the relatively small portion of flow provided by the City's discharge, the City's use of reverse osmosis would have relatively little effect on the ambient EC levels of water downstream in the river. In addition, the City requests that the Regional Water Board take official notice[20] of the fact that operation of a large-scale reverse osmosis treatment plant would result in production of highly saline brine for which an acceptable method of disposal would have to be developed. Consequently, any decision that would require use of reverse osmosis to treat the City's municipal wastewater effluent on a large scale should involve a thorough consideration of the expected environmental effects of that requirement and thorough demonstration of the need for such a response by the City. The Fact Sheet is silent on these points.

Although the conditions in waste discharge permits are established to implement relevant water quality control plans, the effluent limitations in permits may differ from the numerical water quality objectives established in a Basin Plan for various reasons.[21] Where there is substantial assimilative capacity available in the receiving water, effluent limitations established in individual permits may allow for concentrations of pollutants in effluent that exceed water quality objectives for the receiving water. For instances in which a receiving water has been classified as impaired pursuant to section 303(d) of the Clean Water Act, federal law provides for establishing a total maximum daily load (TMDL) for the pollutant involved and allocating allowable amounts of the regulated pollutant among the dischargers to the body of water involved.[22] The TMDL process may result in allowing permit effluent limitations for some dischargers to exceed a numerical water quality objective in the Basin Plan provided that the TMDL implementation program leads to achieving the water quality objectives for the receiving water.

In the present case, the 700 µmhos/cm EC receiving water objective for April through August in the southern Delta frequently is not met, and requiring the City to comply with an effluent limitation of 700

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19 Health and Safety Code section 116786 establishes requirements governing local regulation of water softeners and provides that local ordinances may not require removal of water softeners installed before the effective date of the ordinance.

20 Cal. Code Regs, tit. 23, §648.2.

21 The "Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays and Estuaries of California, 2000" (State Implementation Policy or SIP) provides a methodology for establishing numeric effluent limitation for priority pollutants as identified in the California Toxics Rule (CTR) (40 C.F.R. §131.38). However, EC is not classified as a priority pollutant in the CTR.

22 U.S.C. § 1313(d).

µmhos/cm EC would not significantly change the EC of water in the southern Delta area. In addition, the State Board's 1991 and 1995 Delta Plans, Revised Water Right Decision 1641, and State Board Resolution No. 2004-0062 (attached as Exhibit K) all establish that the State Water Board's intended implementation program for meeting the 700 µmhos/cm EC objective was based primarily upon providing increased flows, possible construction of salinity barriers, and reducing the salt load entering the San Joaquin River from irrigation return flows and groundwater. *See accord* Water Code §13242 (requiring implementation plans for all objectives). No implementation plan exists for the narrative chemical constituent objective contained in the Basin Plan, although such a plan was required by law. *Id.*

The causes and potential solutions to the salinity problems in the southern Delta are highly complex subjects that have received and are continuing to receive an unprecedented amount of attention from the State Water Board in the exercise of its coordinated authority over water rights and water quality. The southern Delta water quality objectives for EC referenced by the Regional Water Board were established in the State Board's 1995 Delta Plan. Although the ultimate solutions to southern Delta salinity problems have not yet been determined, previous actions establish that the State Water Board intended for permit effluent limitations to play no significant role with respect to achieving compliance with the EC water quality objectives in the southern Delta.

The interim limit of 2410 µmhos/cm EC effluent limitation should be placed in the City's permit to become effective with the remainder of the Draft Permit because the Regional Water Board is making a new interpretation of the Basin Plan's chemical constituents narrative objective never before applied to the City. A final effluent limit should be selected, such as the high end of the range for the secondary MCL of 1600 µmhos/cm, as a reasonable condition that will reduce the salinity of the City's effluent, but not place an inordinate and unnecessary burden for South Delta salinity control on the back of the City of Tracy.

A ten-year compliance schedule will allow for other regulatory actions on salinity to progress toward achievement of the objectives in the South Delta (e.g., the salt and boron TMDL). The City's shift toward use of lower salinity surface water for a large portion of its water supply, as well as other source control measures, is expected to allow the City to comply with a 1600 µmhos/cm requirement.[23] Construction and operation of reverse osmosis facilities to treat a significant portion of the discharge from the City's treatment plant, prior to implementation of other measures to reduce the salt load in the southern Delta, would not be a reasonable approach.[24]

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[23] Assuming the validity of the Basin Plan's narrative chemical constituents objective, which is arguable, a 1600 µmhos/cm requirement would be consistent with and implements the prospectively incorporated by reference MCL range for EC, which even allows higher short term averages of 2200 µmhos/cm.

[24] The unreasonableness of mandating limits that will require the implementation of reverse osmosis is supported by the fact that the State Board recently adopted a staff report recommending that the periodic review of the 1995 Delta Plan should consider possible revision of the southern Delta water quality objectives for EC. (State Board Resolution No. 2004-0062.) The staff report states: "..... staff also recommends that the implementation recommendation for these [southern Delta EC] objectives be reviewed to ensure that they are timely described, effective, <u>feasible</u>, and consistent with existing requirements for salinity management in the southern Delta. To the extent possible, staff recommends that review of this issue be coordinated with the CVRWQCB's ongoing TMDL and Basin Plan Amendment (BPA) efforts for salt and boron on the San Joaquin River." (State Board Resolution No. 2004-0062, attached staff report, p. 32.) Given that these objectives may be changed in the future, implementation of high cost treatment to meet current objectives is unreasonable.

Request: Remove the 700 µmhos/cm effluent limit and replace it with an interim limit of 2410 µmhos/cm as a monthly average in the Permit that will apply for ten years, and a final limit of 1600 µmhos/cm as a six-month average.

23. Pgs. 10, 12, 13, Provision IV.A.1., and Fact Sheet pgs. F-43 to F-44 – Copper Limits. The Regional Water Board is again proposing to implement overlapping and redundant objectives that seek to protect the same beneficial use. Here, the applicable water quality objectives for protection of aquatic life uses as contained in the California Toxics Rule are 14.6 µg/L as the CMC (acute) and 9.6 µg /L as the CCC (chronic) based on a proposed hardness concentration of 109 mg/L. 40 C.F.R. §131.38(b). Instead of relying on the CTR criteria, the Regional Board uses a Basin Plan objective for copper of 10 µg /L that has been superseded by the CTR. *Id.* at footnote b (applicable to copper), which does not carve out Basin Plan provisions as being maintained; *see also* 65 Fed. Reg. 31686 (2000)(only excluding selenium in the San Joaquin River from being superseded). Taking into account the objections to daily limits made in paragraph 17 above, the limits for the City should be no less than 9.6 µg/L as a monthly average, since this is the concentration of copper that can be maintained in the water indefinitely without causing an unacceptable effect on the aquatic community or its uses. 65 Fed. Reg. 31691 (2000). If 8.5 µg/L is imposed, then this limit is more stringent than required by federal law and an analysis under Water Code sections 13263/13241 must be performed. *City of Burbank, supra,* 35 Cal. 4th 613 (2005); *see also* Memorandum from William R. Attwater, SWRCB OCC to Regional Water Board Executive Officers regarding consideration of economics in WDRs (Jan. 4, 1994) attached as Exhibit M.

The failure to use the calculated 15 µg/L as a weekly average, for the stated reason that the proposed 15 µg/L "is not protective of the Basin Plan site-specific objective for copper," does not make sense. Effluent limits are set to protect *uses*, not objectives. *See* Water Code §13263(a); 33 U.S.C. §1313(c)(2). So long as the beneficial uses of the receiving waters are protected and the receiving waters do not exceed the applicable objective more than once every three years, a limit higher than the objective is appropriate and justifiable. EPA's CTR criteria and criteria guidance for copper exceed the Basin Plan value. Therefore, if the Regional Water Board chooses to implement a more stringent objective than required by federal law, an analysis under Water Code sections 13263/13241 must be performed. *Id.*

Further, the copper Basin Plan objective of 10 ug/l is not a site-specific water quality objective. It is a basin-wide objective developed to protect aquatic life uses that has been superseded by the CTR aquatic life based objectives.

It should also be noted that the CTR objective for copper is the stated value, times a water effect ratio (WER). While the default WER value is 1.0, the possibility exists to perform studies to establish a site-specific WER for Old River and the Tracy discharge. The permit and fact sheet should acknowledge that the City may perform studies to determine a site-specific WER value and that the permit shall be re-opened to modify the effluent limits for copper if a WER value greater than 1.0 is established.

The permit and fact sheet should also note that the City may perform receiving water studies to establish an appropriate translator value for copper. The proposed effluent limits for copper have been derived based on an assumed copper translator value of 0.96. The permit and fact sheet should acknowledge that the City may perform studies to establish an appropriate translator value and that the permit shall be re-opened to modify the effluent limits for copper if a translator less than 0.96 is established.

Request: The Draft Permit should be revised to include effluent limits no less than 9.6 µg/L as a monthly average, and to include reopeners to allow for WERs and translators derived by the City.

24. Pgs. 10, 12, 13, Provision IV.A.1., and Fact Sheet pg. F-46 to 47 – Iron and Manganese Limits. As with copper, overlapping and redundant water quality objectives are used in the derivation of the proposed effluent limits for iron and manganese. Table 3-1 of the Basin Plan contains dissolved water quality objectives for iron (300 µg/l) and manganese (50 µg/l), applicable to the waters of the Sacramento-San Joaquin Delta. In the Fact Sheet for the proposed permit, the rationale for proposed effluent limits focuses on the use of secondary MCL values for iron (300 µg/l) and manganese (50 µg/l). These MCL values are redundant with the Basin Plan objectives, derived from the same scientific information, and intended to provide the same protection to water supply customers (i.e., avoidance of discoloration in laundry and plumbing fixtures).

The City has the same objection to the use of secondary MCLs for iron and manganese as stated previously with nitrogen. Therefore, the dissolved Basin Plan objectives for iron and manganese should be used in the calculation of effluent limits. Because the objectives are dissolved, the City should be afforded the opportunity to perform translator studies for these metals to establish more appropriate effluent limits. The proposed effluent limits for iron and manganese are based on assumed translators of 1.0. Actual translators for these metals are expected to be much less than 1.0. If studies performed by the City confirm this fact, the permit should state that it will be re-opened to modify the effluent limits for iron and manganese. Such an approach would be similar to the approach advocated by the Regional Board in the Manteca NPDES permit appeal.

In addition, there is no need to express these effluent limits for iron and manganese as daily maximum values. As noted above, these limits are based on secondary MCLs derived to address aesthetic, rather than human health issues, Therefore, effluent limits should be expressed as monthly average values. The State Board has held that implementing long term chronic criteria as daily or instantaneous limits is incorrect. *See City of Woodland,* SWRCB Order No. 2004-0010 at 15.

These effluent limitations will adequately protect both the downstream MUN use and the aquatic life uses since the dissolved U.S. EPA Ambient Water Quality Criterion for the protection of freshwater aquatic life for iron as a chronic value is far higher at 1,000 µg/L.

A chronic aquatic life criterion does not exist for manganese because EPA has determined that "manganese is not considered to be a problem in fresh waters" and that "manganese is rarely seen at concentrations greater than 1 mg/L." *See* EPA Water Quality Criteria Guidance (1986), excerpts attached at Exhibit N. This is consistent with the data in the Tracy permit, which shows receiving water maximum levels of manganese at 0.2 mg/L (or 200 µg/L). *See* Fact Sheet at pg. F-46. Since the time of the EPA criteria guidance, EPA has made a further determination that manganese need not be regulated in public drinking water systems because manganese is an essential nutrient and 2.6% of the population (at that time) were exposed to levels at or above 0.3 mg/L, which is below the average dietary intake. EPA, Health Effects Support Document at 9-11 (2003).[25] Because EPA does not believe manganese is

[25] Given this 2003 determination, a review of the manganese objectives might be in order since there does not seem to be much support for the manganese objectives as being necessary to protect drinking water uses.

worthy of regulation, the City requests that the Regional Water Board remove the manganese effluent limits as unnecessary to protect beneficial uses.

The Regional Water Board should not then rely upon secondary MCLs, because these numbers are inappropriately applied as effluent limitations. Neither DHS nor EPA uses these secondary MCLs as enforceable requirements, they are merely guidelines for public drinking water supply systems for managing their drinking water for aesthetic considerations. *See* EPA Studies found at http://www.epa.gov/safewater/consumer/2ndstandards.html and http://www.epa.gov/ogwdw000/ccl/pdfs/reg_determine1/support_cc1_magnese_ccl_regdet.pdf .[26]

Request: Remove the iron and manganese concentration limits or, at least impose them as monthly average limits. Remove the iron and manganese mass limits or recalculate these limits based on wet weather peak flows.

25. Pgs. 10, 12, 13, Provision IV.A.1., and Fact Sheet pg. F-41-42 – Bis(2-ethylhexyl)phthalate Limits. No need exists to impose a daily value on this constituent since it is a human health objective set to protect for 70 years of exposure eating 6.5 grams of fish and 2 liters of water from downstream waters. A monthly average limit is appropriate and other regional boards in the State routinely require only monthly average limits for human health criteria, such as bis(2-ethylhexyl)phthalate.

In addition, the Regional Water Board should consider an alternative cancer risk factor for this constituent since the likelihood of people having both of the presumed levels of exposure are low. EPA has authorized cancer risk factors from 10^{-4} to 10^{-7}, but selected 10^{-6} for California in the CTR because of its mistaken presumption that the State had selected that level. This was a mistake because EPA was relying upon the Inland Surface Waters Plan of 1991 that was judicially overturned in 1994 for failure to comply with the law. The fact is that California, for drinking water protection has adopted Proposition 65 and drinking water MCLs that are set based on 10^{-5} and 10^{-4} risk levels. *See* 22 Cal. Code Regs. §§ 12703(b) and 12711 (Prop. 65 regulatory cancer risk level which represents "no significant risk" for sources of drinking water is 10^{-5}).

Were the Regional Water Board to select a 10^{-5} risk level, or a 10^{-4} risk level consistent with that used for drinking water human health protection, the City might not have reasonable potential for this constituent, and would not need an effluent limitation, or a compliance schedule and interim limits in order to comply. Adoption of a less rigorous 10^{-5} risk level cancer risk factor would not require a new federal rulemaking as these levels were contemplated in the NTR and CTR criteria. *See* 57 Fed. Reg. 60848 (Dec. 22, 1992).

EPA's human health criteria are based on at least three related considerations: cancer potency or systematic toxicity, length of exposure, and risk characterization. EPA Water Quality Standards Handbook at 3-2 (August 1994). EPA's methodology provides flexibility that should be used by RWQCBs to craft SSOs or effluent limitations while still protecting human health.

Thus, a different cancer risk factor (*e.g.*, 10^{-4} or 10^{-5} used for the derivation of some drinking water standards (*see* Fact Sheet at F-55 citing one-in-a million risk level as de minimis risk level), instead of

[26] These documents are not attached, but are incorporated herein by reference and requested to be included in the record for this permit.

the CTR's use of 10^{-6}) is appropriate.[27] The State is not limited to choosing only the risk level published in the 304(a) criteria guidance documents, nor is the State limited to the base case exposure assumption. *See* CTR, 65 Fed. Reg 31699 ("EPA notes that States and Tribes . . . have the discretion to adopt water quality criteria that result in a higher risk level"). Thus, the State, when adopting water quality standards or deriving effluent limitations, is free to choose a risk level appropriate for the local conditions, as long as it explains the rationale for doing so.[28]

Second, when deriving effluent limitations to implement human health criteria, the water intake factor ("WI") should be altered for CTR/NTR and drinking water criteria. *See* WQS Handbook at 3-9. Where municipal water from this source is combined with other sources of water, the factor WI should be decreased from the presumed 2 liters/day to some lesser number between 0 and 2 liters. Furthermore, since these criteria are set to protect water drinkers over a lifetime of exposure (*i.e.*, 70 years), a great deal of flexibility is built in to adjust for lesser exposures.

Third, when deriving effluent limitations to implement human health criteria, the fish consumption factors should be deleted, or altered to more appropriately reflect actual fish consumption rates, if any, for the water bodies at issue. Because the species found in the waters are not demonstrated to bioaccumulate these substances or to be those sought by sport fishers, fish consumption is necessarily limited as well.

Fourth, exposure assumptions can be altered. Where fish consumption exposure is only anticipated to be rare or only occasional, or where 70 years of exposure is unlikely, the calculations should be adjusted to include a shorter exposure duration. For example, this duration data could be extrapolated from migration data that would show the average length of time an individual resides in a particular area.

Finally, the limits should incorporate harmonic mean dilution. As also specified in the next section for BDCM and DBCM, harmonic mean flow exists in Old River. This amount will provide adequate dilution to result in effluent limits for bis(2-ethylhexyl)phthalate that can be achieved by the City.

Table 1 shows the long term mean daily flow and daily harmonic mean flow in Old River near where the City of Tracy outfall is located. The table mainly demonstrates that there is enough flow to meet the harmonic mean dilution criteria.

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[27] EPA has recognized that "States were not limited to a 1 in 1 million risk level (10^{-6}). EPA generally regulates pollutants treated as carcinogens in the range of 10^{-6} to 10^{-4} to protect average exposed individuals and more highly exposed populations." 57 Fed. Reg. 60855 (Dec. 22, 1992).

[28] *Id.*, WQS Handbook at 3-15. In the Preamble to the NTR, EPA stated that a federal rulemaking would not be needed for the State to adopt a 10^{-5} risk level "because the Agency has considered in this rule that criteria based on either 10^{-5} or 10^{-6} risk levels meet the requirements of the Act." 57 Fed. Reg. 60860. If the State wished to use a risk level below 10^{-5}, it merely had to submit support in the record for the adoption of this alternate level. *Id.*at 60855.

Table 1. Long-term daily harmonic mean and arithmetic mean flows in Old River near the City of Tracy WWTP Outfall

	16-Year (1975-1991)	14-Year * (1975-1981 & 1984-1991) —*excluding wet years (82 and 85)
Daily Harmonic Mean Flow (cfs)	548.85	492.3
Mean Daily Flow (cfs)	2087.7	1387.85

This data demonstrates that under current conditions, dilution flows are sufficient for harmonic mean dilution to be provided.

In addition to making changes to proposed numeric effluent limitations, the Regional Water Board should also consider not imposing a numeric limit at all since such limits are not required under federal law where a discharger demonstrates that it would be infeasible to comply with such limits. 40 C.F.R. §122.44(k)(3). In lieu of a numeric effluent limit, the Regional Water Board should impose Best Management Practices (BMPs), source control, pollution prevention activities, or similar non-numeric effluent limitations since the Draft Permit acknowledges that the proposed numeric final effluent limitations based on an end-of-pipe application of CTR objectives are infeasible. *Id*.; *Communities for a Better Environment v. State Water Resources Control Board* (2003) 109 Cal. App. 4th 1089, 1104-5; *In the Matter of the Petition of Citizens for a Better Environment, Save San Francisco Bay Association, and Santa Clara Valley Audubon Society*, Order No. WQ 91-03 (May 16, 1991).

Request: Revise the limits for bis(2-ethylhexyl)phthalate to include only monthly average limits and to consider harmonic mean dilution and alternate cancer risk levels in the reasonable potential analysis.

26. Pgs. 10, 12, 13, Provision IV.A.1., and Fact Sheet pg. F-42 to F-45 – <u>BDCM and DBCM Limits</u>. The Draft Permit proposes effluent limits for bromodichloromethane (BDCM) and dibromochloromethane (DBCM). First, it should be noted that these constituents names do not mirror those used in the CTR, namely dichlorobromomethane and chlorodibromomethane. To avoid confusion, the names used in the CTR should be acknowledged in the Draft Permit as synonyms for the BDCM and DBCM.

The Fact Sheet states that the CTR criteria for BDCM and DBCM are applied as end-of-pipe effluent limits due to the absence of information on dilution in Old River. In the derivation of effluent limits for human health-based constituents such as BDCM and DBCM, which are of concern as long term averages, the diluting flow to be considered is the harmonic mean flow. Following the calculation methods used by the Central Valley Regional Board in the NPDES permit for the City of Manteca, it is estimated that a harmonic mean flow in Old River in the range from 109 to 206 cfs will provide

adequate dilution to result in effluent limits that can be achieved by the City [*see* attached calculations at Exhibit O]. Table 1 above demonstrates daily harmonic mean flow above this level.

As noted in the Fact Sheet, flows in Old River have been reduced due to installation and operation of the temporary barriers in the South Delta. Historic daily low flow conditions in Old River (prior to the South Delta barriers) exceeded 500 cubic feet per second (cfs)[Draft EIR, South Delta Management Program EIR, 1990]. In responding to comments made by the Central Valley Regional Board on the City's Draft EIR for its proposed wastewater treatment plant expansion, the City determined that the current harmonic mean flow in Old River with barriers in place exceeds 219 cfs. The City requests that the above value in Table 1 be used in the derivation of effluent limits for BDCM and DBCM. To the extent the Regional Board believes corroboration of the harmonic mean flow estimates provided by the City is necessary, it is requested that the Regional Board accept harmonic mean flow estimates that can be provided by the Department of Water Resources.

In the Fact Sheet discussion of total THMs, the Regional Board acknowledges that levels of total THMs (chloroform, BDCM and DBCM) in the City's effluent are significantly lower than the 80 ug/L total THM tap water limit specified in the Safe Drinking Water Act for protection of human health. Also, as pointed out in the Fact Sheet, no drinking water intakes are located in the vicinity of the City's discharge to Old River. Therefore, consideration of dilution based on harmonic mean flow conditions in the Old River will result in effluent limits for BDCM and DBCM that are protective of municipal water supply uses.

Further, as with the comment above for bis(2-ethylhexyl)phthalate, the Regional Water Board should also consider adjusting the cancer risk factors, water intake, fish consumption, and exposure assumptions along with longer term averages or non-numeric effluent limitation to avoid compliance problems while still adequately protecting the potentially affected beneficial uses.

Request: Provide harmonic mean dilution for the BDCM and DBCM limits and impose such limits as monthly average concentration limits only.

27. Pgs. 11, 12, 13, and Fact Sheet pg. F-48 – Methyl tert-butyl ether (MTBE) Limits. As discussed above, the use of drinking water MCLs as effluent limitations is inappropriate. Notwithstanding those arguments, the City also points out that the Regional Water Board has utilized the inappropriate MCL by using a secondary MCL when a primary MCL exists. The primary MCL in 22 C.C.R. §64444 is 0.013 mg/L, and the secondary MCL in 22 C.C.R. §64449 is 0.005 mg/L (not 5 mg/L as stated in paragraph s. of the Fact Sheet at pg. F-48). Thus, the limit should be based on the primary MCL, if based on an MCL at all. In that case, the reasonable potential analysis should be performed based on 13 µg/L and there would likely be no reasonable potential with the projected MEC of 5.2 µg/L. If reasonable potential remains, then the proposed AMEL of 5 µg/L would be replaced with at least 13 µg/L or with a non-numeric effluent limitation as described above.

Request: If MCLs are used to set effluent limits, use the primary MCL and impose a monthly average limit of at least 13 µg/L.

28. Pg. 14, Provision IV.A.1.f. – Temperature Limit. This requirement should merely state that the City shall comply with the Thermal Plan, as applicable. This would allow the City to seek an exception authorized under that plan. The current limit may be difficult to meet particularly if the City is

successful in receiving additional flows through Old River as a result of negotiations with the Department of Water Resources. Since those flows would be beneficial in many ways (raising DO in Old River, helping to reduce growth of water hyacinths, flushing action of the additional flows), the Regional Water Board should not require a temperature effluent limit that might work against provision of additional flows in the Old River.

Request: Replace current temperature requirement with a requirement to comply with the Thermal Plan.

29. Pg. 14, Provision IV.A.1.g. – Chlorine Mass Limits. The permit needs to specify the need for mass limits since residual chlorine toxicity is a concentration issue, not mass.

Request: Remove mass limits for chlorine, or adequately justify the need for such limits with scientific and site-specific evidence.

30. Pg. 15, Provision IV.A.2.d. – Mercury Mass Limit. The Draft Permit proposes an annual mass discharge of total mercury shall not exceed 0.51 pounds/year. The City requests that clarifying language be added to state that this limit will remain in place until completion of the following steps: adoption of the Delta mercury TMDL, final approval of the TMDL and associated Basin Plan by the State Water Board, OAL, and EPA, AND after this Permit is reopened and the corresponding effluent limits to implement the applicable wasteload allocation are formally adopted. TMDLs are not self-implementing. *See Pronsolino v. Nastri* 291 F.3d 1123, 1140 (9th Cir. 2002) (*cert. denied* 539 U.S. 926 (June 16, 2003) (States must implement TMDLs only to the extent that they seek to avoid losing federal grant money; there is no pertinent statutory provision otherwise requiring implementation of § 303 plans [TMDLs] or providing for their enforcement.) Any limits suggested or wasteload allocations included in a final TMDL cannot be presumed to be part of this permit after expiration of the interim limits without a subsequent permit amendment action.

Request: Include the requested clarifying language related to expiration of the interim limit.

31. Pg. 16, Provision IV.B. and C; Pg. 18, Provision V.B.; Pg. 27-28, Provisions VI.C.2.c. and d.; Pg. 33, Provision VI.C.5.b.; Pgs. E-9 and E-11 to E-12, Provisions VI.A.,VII., and VIII.B, F-12, Section III.B.3.b., Pg. F-65, Section IV.E. and F, Pg. F-69, Section V.B., Pg. F-70, Section VI.D.2. These sections related to land discharge and water reclamation requirements, which are beyond the scope of an NPDES permit and will inadvertently federalize these requirements and make them subject to U.S. EPA enforcement and citizen suits. For these reasons, these requirements should be removed from the Draft NPDES Permit. The Regional Water Board should issue separate Waste Discharge Requirements (WDRs) for the discharges to land and Water Reclamation Requirements (WRRs) pursuant to Water Code section 13523 to cover recycled water distribution and use.

Request: Remove the WDR and WRR provisions from the NPDES permit and place in separate WDRs and WRRs, or at least clearly specify that these are not federally enforceable requirements.

32. Pg. 16, Provision IV.B.1.a., TSO Findings 14 to 17 and Provisions 5 and 6, and Fact Sheet Pgs. F-17 to F-18, Section III.B.3.c., and Pg. F-65, Section IV.E. – References to "Hazardous Waste," "Designated Waste" and Title 27 Requirements

The Draft Permit prohibits the discharge of waste classified as "hazardous" or designated" to referenced treatment ponds. *See* Draft Permit at Provision IV.B.1.a. In the Fact Sheet, the Regional Board determines that the wastewater generated by Leprino foods and provided to the City for further treatment via the referenced treatment ponds is "designated" waste. Pursuant to the terms of the TSO, unless or until the City installs liner systems in the treatment ponds in accordance with Title 27, wastewater generated by Leprino foods cannot be contained in the treatment ponds. *See* TSO Findings 14 to 17 and Provisions 5 and 6. The City has the following comments.

First, the Fact Sheet and the Draft Permit fail to reference that the industrial wastewater provided by Leprino to the City for additional treatment has already undergone pretreatment via two lined pretreatment ponds. The two lined pretreatment ponds act as completely mixed-aeration basins, providing treatment via a coarse bubble aeration system and nitrogen to provide a proper nutrient balance. Thus, before being stored in the City's facultative holding ponds, the industrial wastewater has already been subject to pretreatment. Once delivered to the City's facultative holding ponds, which have compacted soil liners, the industrial wastewater receives further treatment in City Pond 2, where surface aerators are used to enhance BOD removal. Thereafter, the industrial wastewater is temporarily stored before being sent to the City's treatment facility.

Second, contrary to the Regional Board's findings in the Fact Sheet, the pretreated industrial wastewater, which is stored in the City's facultative holding ponds prior to being accepted into the City's treatment facility, is not "designated" waste, and the Regional Board has failed to establish with findings supported by evidence that such industrial wastewater demonstrates the characteristics of "designated waste." The California Water Code defines "designated waste," in part, as "nonhazardous waste that consists of, or contains, pollutants that, under ambient environmental conditions at a waste management unit, could be released in concentrations exceeding applicable water quality objectives or that could reasonably be expected to affect beneficial uses of the waters of the state as contained in the appropriate state water quality control plans." Prior to finding the treated industrial wastewater qualified as "designated" waste, the Regional Board failed to analyze whether treated industrial wastewater could be released in concentrations exceeding applicable water quality objectives or that could reasonably be expected to affect beneficial uses of waters of the state under ambient environmental conditions at a waste management unit. Furthermore, and as noted elsewhere in these comments, the use of ambient water quality objective(s) by the Regional Board to deem the treated industrial wastewater "designated" (chemical constituents water quality objective or other objective(s) for salinity (*i.e*., electrical conductivity and/or TDS)) is inappropriate.

Third, even if the industrial wastewater were properly considered to be "designated" waste, the treatment and storage of the pretreated industrial wastewater in the City's facultative holding ponds is exempt from the technology-based requirements of Title 27 pursuant to 27 Cal. Code Regs. sections 20090(a) and (b). In the Fact Sheet, the Regional Board dismisses application of the exemptions at sections 20090(a) and (b) based solely on its erroneous assumption regarding the alleged impact of the City's facultative holding ponds on groundwater underlying the site.

Sections 20090(a) and (b) exempts the following types of discharges from the requirements of Title 27:

> Section 20090(a): "Sewage–Discharges of domestic sewage or treated effluent which are regulated by WDRs issued pursuant to Chapter 9, Division 3, Title 23 of this code, or for which

> WDRs have been waived, and which are consistent with applicable water quality objectives, and treatment or storage facilities associated with municipal wastewater treatment plants, provided that residual sludge or solid waste from wastewater treatment facilities shall be discharged only in accordance with the applicable SWRCB–promulgated provisions of this division."
>
> Section 20090(b): "Wastewater – Discharges of wastewater to land, including but not limited to evaporation ponds, percolation ponds, or subsurface leachfields if the following conditions are met: (1) the applicable RWQCB has issued WDRs, reclamation requirements, or waived such issuance; (2) the discharge is in compliance with the applicable water quality control plan; and (3) the wastewater does not need to be managed according to Chapter 11, Division 4.5, Title 222 of this code as a hazardous waste."

Application of both of these exemptions requires the Regional Board to determine that any incidental discharge from ponds that do not implement Title 27 technology-based requirements is consistent or compliant with the applicable water quality control plan and/or water quality objectives contained therein. In this case, no evidence exists to demonstrate that any incidental discharge is not consistent or compliant with the applicable water quality control plan and/or water quality objectives contained therein. The Regional Board's *only* basis for finding to the contrary is an assumption that because recent levels of TDS/EC in the City's facultative holding ponds now exceeds the level of TDS/EC in the groundwater downgradient from the holding ponds, that the City's facultative holding ponds is causing conditions in the groundwater detected almost twenty years ago.

In the Fact Sheet, the Regional Board states that "Regional Board staff have been concerned about possible degradation of groundwater cause by the unlined [holding] ponds for many years." *See* Fact Sheet at F-13. The Regional Board proceeds to describe the groundwater monitoring program the Regional Board requested, and the City implemented, since 1989. From 1989 until 2004, the Regional Board and the City concluded that shallow groundwater concentrations of TDS/EC is naturally high, and that notwithstanding the fact that the TDS/EC levels in monitoring wells downgradient of the holding ponds were higher than monitoring wells upgradient of the holding ponds, the holding ponds were not negatively affecting the water quality of the shallow groundwater because pond TDS/EC levels were lower than downgradient wells. Now, recent data reveals that TDS/EC levels in the holding ponds can periodically exceed the level of TDS/EC in downgradient shallow groundwater. For this sole reason, the Regional Board is now assuming, without the benefit of further analysis or study, that the holding ponds are causing downgradient groundwater to exceed water quality objectives in the Basin Plan. *See* Fact Sheet at F-15 (stating "it is reasonable to conclude the ponds are affecting groundwater quality"). It is this assumption that forms the basis of the Regional Board's determination that the exemptions set forth in sections 20090(a) and (b) do not apply.

It is just as likely that the downgradient groundwater may exceed the water quality goal guidance criteria due to ambient aquifer geochemical conditions or other discharges in the area, including irrigated agriculture. Instead of making findings based on gross assumption, the Regional Board should, instead, require additional study before imposing the costly Draft Permit and TSO provisions cited above. If the City is required to install liners in the holdings ponds in accordance with Title 27, the City will be required to expend approximately $22.0 M (50 acres x 43560 sq.ft/acre x$1/sq. ft). No conclusive evidence exists to require such expenditures. For these reasons, the City requests that the Regional Board remove Provision IV.B.1.a. from the Draft Permit and Provisions 5 and 6 from the TSO, and eliminate corresponding findings.

If requirements related to the discharge of "designated" waste to groundwater and Title 27 compliance are retained in any form, the City requests the Regional Board remove these provisions from the federally-enforceable NPDES permit, and instead, include them in separately issued state-only WDRs for discharges to land. At the very least, if the provisions are retained in the City's NPDES/WDR permit, the Regional Board should specifically state that the provisions at issue are imposed only pursuant to state law, and are not imposed under, or enforceable by, the Clean Water Act.

Finally, the Regional Board's reference to Resolution 68-16 on page F-17 of the Fact Sheet is inappropriate. Resolution 68-16 applies only to "high quality" waters. The groundwater underlying the holding ponds, by the Regional Board's own findings, is not high quality water. Thus, the Regional Board should remove reference to Resolution 68-16. *See* City Comment #34.

Request: Remove Provision IV.B.1.a. from the Draft Permit and Provisions 5 and 5 from the TSO, and corresponding findings.

33. Pgs. 16-18, Provision V.A – Receiving Water Limitations. Narrative receiving water requirements have not been demonstrated to be necessary. If the discharge has a reasonable potential for any of these constituents for which receiving water limitations are proposed, then the appropriate regulation is an effluent limit. If there was no reasonable potential, as was the case for pesticides, then no regulation of these substances is required. Similarly, where an effluent limit is being proposed, as in the case of turbidity, a receiving water limitation is unnecessary. For these reasons, the Regional Water Board should remove the proposed receiving water limitations.

Request: Remove the Receiving Water Limitations as not required and unnecessary.

34. Pg. 18, Provision V.B., and Fact Sheet at Pg. F-12, Section III.B.3.b., Pg. F-65, Section IV.E., Pg. F-69, Section V.B. – Groundwater Requirements and Limitations. The Draft Permit's Groundwater Limitations section V.B. prohibits the release of waste constituents from any storage, treatment, or disposal component associated with the Facility, in combination with other sources of waste constituents, from causing underlying groundwater to contain waste constituents in concentrations statistically greater than background quality. The City objects to this section as exceeding the Regional Board's authority, and requests the section to be modified for the following reasons.

State and federal anti-degradation policies require that the quality of the water not be *unreasonably* degraded and that beneficial uses be maintained. These two policies allow some flexibility and are not intended to reflect a state or national policy that no increase in any constituent can occur. Such an interpretation is not supported by State Water Board's policies, administrative guidance, or case law.

The State Board's "Statement of Policy with Respect to Maintaining High Quality of Waters in California," Resolution 68-16, (the "Anti-Degradation Policy"), which the City presumes is the basis for Groundwater Limitation section V.B., applies only where the quality of the subject waterbody is higher than the quality established and required by water quality control policies (*i.e.*, Basin Plans). As noted above, in this case, the groundwater quality at issue is higher than the Regional Board's interpretation of its Basin Plan water quality objectives. Thus, the Anti-Degradation Policy does not apply, and should not be used as a basis for groundwater limitations. Furthermore, no other provision of federal or state

law specifically requires or authorizes the imposition of a provision requiring background water quality be strictly maintained, especially where beneficial uses are not unreasonably impacted.

Even if the groundwater basin at issue were deemed to be a "high quality" water, the Anti-Degradation Policy does not *prohibit* the degradation of such high quality waters. Rather, the Anti-Degradation Policy allows "high quality" water to be lowered in quality if the Regional Board finds that the "change will be consistent with maximum benefit to the people of the State, will not unreasonably affect present and anticipated beneficial use of such water and will not result in water quality less than that prescribed in the policies." *See* Anti-Degradation Policy at Provision 1. In this case, the City's treatment of industrial and domestic wastewater is a public service, and any degradation of existing water quality (that does not result in exceedance of applicable formally adopted groundwater quality objectives) is certainly consistent with the maximum benefit to the people of the State.

In *In the Matter of the Petitions of the County of Santa Clara, et al.*, State Board Order No. WQ 86-8, 1986 Cal. ENV LEXIS 10 (May 5, 1986), the State Board held that limited degradation of a high quality water is allowed as long as that change "will not unreasonably affect beneficial uses, will be consistent with the maximum benefit to the people of the State of California and [will be consistent] with the factors listed in Water Code section 13241." *Id.* at page 47. Thus, limited degradation of a high quality water can be allowed if:

- The reduction in water quality will not unreasonably affect beneficial uses;
- The reduction in water quality is consistent with maximum public benefit; and
- The reduction in water quality will be consistent with the factors listed in Water Code section 13241.

The State Board's Administrative Procedures Update, State Board APU 90-004, ("APU") further explains that the Regional Board should consider four factors when determining whether the discharge is necessary to accommodate social or economic development (*i.e.*, the Water Code section 13241 factors) and is consistent with maximum public benefit:

1. Past, present and probable beneficial uses of the water;
2. Economic and social costs, tangible and intangible, of the proposed discharge compared to benefits (*i.e.*, a cost-benefit analysis);
3. The environmental aspects of the proposed discharge must be evaluated; and
4. The implementation of feasible alternative control measures which might reduce, eliminate, or compensate for negative impacts of the proposed action.

APU at p. 5. In considering the economic and social costs compared to benefits, the APU states that:

> The economic impacts to be considered are those incurred in order to maintain existing water quality. The financial impact analysis should focus on the ability of the facility to pay for the necessary treatment.

According to the Anti-Degradation Policy, once the Regional Board makes the above-stated findings to allow some degradation to occur, the Regional Board must then impose waste discharge requirements that will result in the "best practicable treatment or control of the discharge necessary to assure that (a) a

pollution or nuisance will not occur and (b) the highest water quality consistent with the maximum benefit to the people of the State will be maintained." *See* Anti-Degradation Policy at Provision 2.

In this case, as noted above, the City's treatment and storage of industrial and domestic wastewater is a public service, and any degradation of existing water quality (that does not result in exceedance of applicable groundwater quality objectives or natural background if higher than the objective) is consistent with the maximum benefit to the people of the State. As noted in the Draft Permit, the City is already in the process of upgrading certain features of its treatment and storage facilities; therefore, the Draft Permit already imposes the best practicable treatment or control of the discharge. Finally, the cost to install further advanced treatment or storage facilities to ensure no statistical change to background groundwater quality far outweighs the benefits of no degradation. For this reason, the City requests that the Regional Board delete section V.B.

Request: Remove Provision V.B. entitled "Groundwater Limitations" from the Draft Permit.

35. Pg. 22, Provision VI.B. – Monitoring and Reporting Program Requirements. The Draft Permit requires compliance with the Monitoring and Reporting Program (MRP), as well as future revisions thereto. The clause referencing ", and future revisions thereto," should be deleted from this section as the MRP cannot be amended without reopening the permit. This action cannot be delegated to the Executive Director. Water Code §13223(a); *see accord San Francisco BayKeeper, et al v. SFRWQCB,* Order Granting Petition for Writ of Mandate and Statement of Decision, San Francisco Superior Court, Consolidated Case No. 500527 (Nov. 2003)(holding that the ability to make changes to a permit that will modify or enhance the substantive requirements of the permit cannot be delegated to the Executive Officer).

Additionally, the proposed permit states that all technical and monitoring reports submitted pursuant to this Order are required pursuant to Sections 13267 and 13383 of the California Water Code. *See* Fact Sheet at pg. F-69.

While Section 13383 does provide the Regional Board with discretion ("may") to establish monitoring and reporting requirements, these requirements only apply "to actions required under the Federal Water Pollution Control Act and acts amendatory thereof or supplementary thereto." *See* Water Code Section 13372(a). Thus, if the proposed permit requirements are not expressly required by the Clean Water Act or its regulations, then this requirement in Chapter 5.5 is not applicable.

Further, the requirements of Section 13383 do not say "notwithstanding any other provision of this division," which would work to make this section alone apply. Since these words are not included, the mandatory requirements of Sections 13267(b)(1) and 13225(c) apply to all monitoring and reporting requirements and mandate that the Regional Board demonstrate that the burden (including cost) of their request bears a reasonable relationship to the need for the report and the benefits to be obtained therefrom. In fact, subsection (c) of Section 13383 specifically references Section 13267, thereby confirming the applicability of that section.

Request: Remove the clause ", and future revisions thereto," from this section as the MRP as the MRP cannot be amended without reopening the permit. Further, as a generally applicable comment, for all monitoring and reporting requirements, the Regional Board must justify the need and burden (including cost) for the monitoring and reporting in accordance with Water Code §13267(b) and §13225(c).

36. Pg. 22, Provision VI.C.1.a., and Fact Sheet, Pg. F-71, Section VII.B.1.a.i. – Reopener for new standards. The permit should be reopened to allow modification when a new water quality standard is adopted, whether that standard is more or less stringent. This is particularly important where interim limits are imposed because of an inability to meet final limits, and the underlying standard is made less stringent and potentially more attainable. As such, the language should be modified as follows:

> "If more or less stringent applicable water quality standards are promulgated or approved pursuant to Section 303 of the CWA, or amendments thereto, this permit may be reopened and modified in accordance with such amended ~~more stringent~~ standards."

In addition, another reopener should be included for changes to the permit template so that the City could get the benefit of changes made as a result of discussions ongoing at the State Board level over appropriate and legal requirements in the permit template.

Request: Amend the reopener provisions as requested.

37. Pg. 23, Provision VI.C.1.j. – Dilution Credits. This new paragraph contains several inaccuracies. First, this paragraph states that end-of-pipe effluent limits for all constituents are required because no dilution has been granted. This is not correct. Limits are not imposed for "all constituents," only for those demonstrated to have reasonable potential. Also, end-of-pipe limits are not required. The Regional Water Board could impose a compliance point in the water at some point downstream instead of at the end of the pipe.

Second, the Regional Water Board implies that dilution could only be granted with real-time flow monitoring data, but provides no authority for this contention. Dilution is granted around the state from modeling, harmonic mean studies, and other flow data that is not "real-time." For this reason, this section should be changed to allow any type of flow data or modeling that demonstrates the availability of dilution.

Request: Remove references to "real-time" data and allow for inclusion of harmonic mean or other dilution analyses.

38. Page 25, Provision VI.C.2a. Special Studies, Technical Reports and Additional Monitoring Requirements – Remove all language following the first sentence. Add to this section following the first sentence "If the Regional Board determines that the TRE Workplan must be implemented, the Permittee will take the actions specified in the approved TRE Workplan. In addition, the Regional Board should remove Provision VI.C.2aiii. defining Numeric Monitoring Trigger (and any other references in the Draft Permit to the numeric monitoring trigger) as this trigger will be defined in the TRE Workplan, which must be approved by the Regional Board. Similarly, Provision VI.C.2.a.iv., defining Accelerated Monitoring Specifications, should be removed because any accelerated monitoring specifications will be outlined in the City's TRE Workplan and need not be mentioned here.

39. Page 27, Provision VI.C.2.c, Fact Sheet Pgs. F-13 to F-17, Section III.B.3.b, and Pg. F-65, Section V.B, Pg. F-73, Section VI.B.1.i. - List and schedule of requested groundwater and pond analyses. The City has been collecting comprehensive water level and water quality data since 1990 from its monitoring network around the ponds at its wastewater treatment plant. These data have been

provided to the Regional Board by the City. The analyzed parameters include general chemistry and metals as well as parameters such as electrical conductivity (EC), pH, and total dissolved solids (TDS).

The Regional Board has requested that the City collect quarterly samples for a variety of parameters (see Appendix E, Sections VI and VIII). Several analyses not currently being performed on the samples are included in this request. These include ammonia and total coliform, as well as the Title 22 metals such as cobalt, molybdenum, and vanadium. Including the additional Title 22 metals does not appear to be warranted, based on the type of facility, current groundwater conditions, and the historic record of analyses from the plant indicating that metals are not elevated. Therefore, Title 22 metals should be deleted from Appendix E, Section VIII.B.

Total Coliform analyses should be modified because the test requires sample analysis within 24 hours of collection. Because laboratories usually require sample delivery by mid-afternoon to ensure that the analyses are conducted within the required time limit, logistical issues exist with collecting and delivering a suite of samples in the timeframe required. Therefore, the Regional Water Boards should modify Section VIII.B to state that the City shall collect and analyze two quarterly sets of samples. If all samples come back negative, then the requirement will have been satisfied. If not, then sampling will continue as requested by the Regional Board. The ammonia requirement can easily be added to the sampling routine.

<u>Impact of the Ponds on Local Groundwater Quality</u>

The Regional Board evaluated groundwater quality at the ponds by averaging data from multiple wells and ponds. Only data from HP-5, the local upgradient well, was presented individually. This approach does not allow data to be reviewed relative to local groundwater gradients or compare pond data to adjacent monitoring well data. In addition, by not including the other local shallow groundwater data presented in the April 2005 evaluation (as shown on Figure 10 reprinted here) 'background data' is biased towards the single well HP-5.

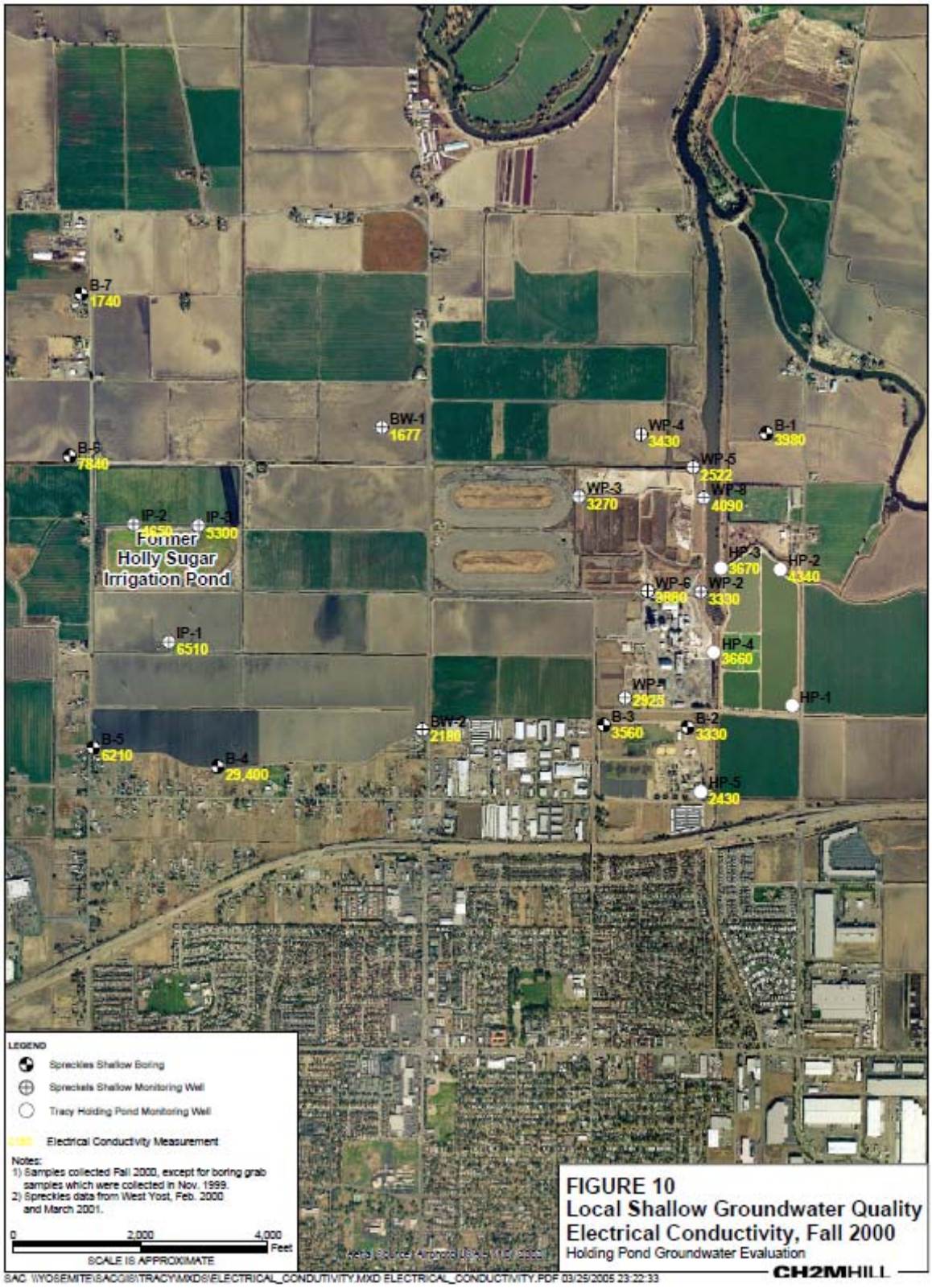
The City requests that the Regional Water Board reconsider their evaluation that states that "the unlined treatment ponds are adversely affected groundwater" (Fact Sheet at page F-15) because

- Spikes in TDS, chlorides, and EC observed in pond samples are not observed in groundwater samples before, contemporary to, or after the spikes.
- The data for pH, chlorides, EC, and TDS do not show overall increases over the 13 years of groundwater quality records.
- A high level of EC variability exists in the vicinity of the WWTP and the Spreckels facility that is unrelated to the ponds. EC values range from 1,677 to 29,400 μmhos/cm at the sampled points in Figure 10.

Because the groundwater data show that water quality conditions are locally variable and no strong, conclusive evidence exists or has been presented that groundwater quality near the ponds is being degraded by the ponds themselves, the Regional Water Board requirement for significant action on the City's part (other than their current level of operation, management, and monitoring) appears to be unwarranted.

In addition, the Fact Sheet at Page F-15 states that "Pond lining technology that conforms to Title 27 requirements must be utilized to prevent further degradation of the groundwater." This evaluation is due

to the Regional Water Board's apparent determination that water in the ponds "exceeds the water quality objectives prescribed in the Basin Plan." The EC objective for downstream surface waters in the Basin Plan is 700 (April 1 through August 31) and 1000 μmhos/cm (September through March 31), but there is no applicable site-specific EC objective for local groundwaters. Given the local groundwater EC values generally range from 3,000 to 6,000 μmhos/cm, enforcing the surface water objectives at the ponds is not warranted. In addition, the Regional Water Board has not submitted evidence that this local groundwater is being used to irrigate salt-sensitive crops or that any crops being irrigated with this water have been adversely and significantly affected by the local groundwater quality. For this reason, the non-regulatory agricultural goal of 700 μmhos/cm is inappropriate.


B-7
1740
BW-1
1677
WP-4
3430
B-1
3980
B-6
7840
WP-5
2522
WP-3
3270
WP-8
4090
IP-2
4650
IP-3
3300
Former
Holly Sugar
Irrigation Pond
HP-3
3670
HP-2
4340
WP-6
3680
WP-2
3330
IP-1
6510
HP-4
3660
WP-1
2925
HP-1
BW-2
2180
B-3
3560
B-2
3330
B-5
6210
B-4
29,400
HP-5
2430
LEGEND
Spreckles Shallow Boring
Spreckels Shallow Monitoring Well
Tracy Holding Pond Monitoring Well
Electrical Conductivity Measurement
Notes:
1) Samples collected Fall 2000, except for boring grab samples which were collected in Nov. 1999.
2) Spreckles data from West Yost, Feb. 2000 and March 2001.
0
2,000
4,000
Feet
SCALE IS APPROXIMATE
FIGURE 10
Local Shallow Groundwater Quality
Electrical Conductivity, Fall 2000
Holding Pond Groundwater Evaluation
CH2MHILL
SAC \\YOSEMITE\SACGIS\TRACY\MXDS\ELECTRICAL_CONDUTIVITY.MXD ELECTRICAL_CONDUCTIVITY.PDF 03/29/2005 23:22:33

Impact of the Sludge Drying Beds on Local Groundwater Quality

The sludge drying beds are located in the northwestern portion of the WWTP site. The holding ponds are located in the north-central portion of the site (*see* Figure 10 above). EC values of shallow groundwater immediately upgradient of these two sites were collected as part of the Spreckles investigation. These values (2,925, 3,330, and 3,560 µmhos/cm) are within the range of other EC values in the area. Therefore, adverse impacts to groundwater are not observed and additional investigation is not warranted.

40. Pgs. 25-26, Provision VI.C.2.a., and Fact Sheet, Pg. F-61 to F-62, Section IV.C.5.b., Pg. F-73, Section VII.B.2.a. – Chronic Whole Effluent Toxicity. The City strongly favors the proposed use of toxicity triggers in lieu of numeric toxicity effluent limits. In the determination of toxicity units, the City requests that IC25 point estimates be used as the endpoint in lieu of NOEC values.

41. Pg. 26, Provision VI.C.2.b.,c., d., and Fact Sheet Pgs. F-77 to F-78, Section VII.B.2.b.and c. - Temperature Study, Groundwater Monitoring, Sugar Cut Slough Monitoring Study. The City objects to the requirement to lead the effort to prepare a regional temperature study in the South Delta on the premise that existing temperature objectives are inadequate for protection of fisheries. The City's most significant impacts on temperature occur during a period when the South Delta barriers are in place – during such times, fish migration is limited and temperature effects to sensitive species are not anticipated to be significant.

In addition to the above comments, the City would propose some changes to the schedules proposed for many of the special studies included in Provision VI.2. as set forth below:

NPDES Studies and Schedule

Study	**Current Schedule**	**Proposed Schedule**
Toxicity Reduction Evaluation (TRE)	Work plan within 90 days of effective date	OK
Temperature Study-	Work plan by April 1, 2007 and Complete study by Nov 2008	If maintained, work plan within 6 months of effective date and Complete study 4 years after start
Groundwater Monitoring	Start Monitoring after effective date and Submit report by December 2007	OK
Sugar Cut Slough Monitoring Study	Work plan by July 1, 2006 and Complete Study by Dec 2007.	If maintained, work plan within 6 months of effective date and complete study 2 years after start
Pollution Prevention Plan for Mercury	Work plan by August 1, 2006 and Complete Study by March 1, 2008.	Work plan within 6 months of effective date and Complete study 2 years after start

Best Practicable Treatment or Control Evaluation	Work plan within 6 months following order adoption and complete study within 2 years	OK
Pollution Prevention Plans for bis(2-ethylhexyl)phthalate, copper, DBCM, and BDCM	Work plan by August 1, 2006 and Complete Study by January 1, 2008.	Work plan within 6 months of effective date and Complete study 2 years after start
Treatment Feasibility Studies	Work plan by August 1, 2006 and Complete Study by January 1, 2008.	Work plan within 6 months of effective date and complete study 2 years after start
Sanitary Sewer System Operation, Maintenance, Overflow Prevention, and Response Plan	Complete by January 1, 2007	OK
Progress Reports for above Studies	June 1 and December 1 of each Year.	OK

42. Pg. 28, Provision VI.C.4.b.i; Pg. 29, Provision VI.C.4.c.i. – Effluent Limitation Compliance. This section requires compliance with final effluent limitations without recognizing any of the interim limits except for EC. This eliminates the effectiveness of providing interim limits in lieu of the final limits and should be modified to allow delayed compliance with the final effluent limits for any constituent that has an interim limit either in the Draft Permit or the proposed TSO.

Request: Redraft this section to acknowledge applicability of compliance schedules and interim limits.

43. Pg. 31, Provision VI.C.5.a., and Fact Sheet Pg. F-79, Section VII.B.5. – Sanitary Sewer Provisions. The Draft Permit should be amended to include the following exceptions to any prohibitions that could be construed as relating to upsets, accidental discharges, or sanitary sewer overflows (SSOs). *See accord* SFRWQCB Order No. R2-2004-0014 at pgs. 9-12; 40 C.F.R. §122.41(n). In order to provide equal protection under the law and ensure that Tracy is not regulated more severely than other similarly situated permit holders in the State of California regulated under the Water Code or in the nation regulated under the Clean Water Act, Tracy requests the following language be added at Page 34 of the Permit:

"**VI. C. 5. . . .**

b. *Enforcement Considerations.*

1) In any enforcement action, the Board will consider the Permittee's efforts in containing, controlling, and cleaning up the discharge or SSO. The Board will also consider the Permittee's efforts in sewer rehabilitation as well as implementation of a sanitary sewer management program or infiltration/inflow ("I/I") correction program. These considerations are part of the factors required by Section 13327 of the California Water Code.

2) The Permittee shall make every practicable effort to contain accidental discharges and SSOs, and to prevent non-compliant wastewater from entering storm drains

and surface water bodies.

3) The Discharge Prohibitions are not violated under either of the following:
   a) If the SSO does not enter a surface water body, or
   b) If the Permittee contains the SSO within the storm drain system pipes and recovers and cleans up the spilled wastewater.
   c) However, these incidents of SSOs shall be reported to the Board as SSOs.

c. *Discharges Caused By Severe Natural Conditions.* Enforcement actions may be taken against the Permittee for any discharge unless the Permittee demonstrates through properly signed, contemporaneous operating logs, or other relevant evidence that:
   1) The discharge was caused by severe natural conditions, such as hurricanes, tornadoes, flooding, earthquakes, landslides, tsunamis, or other similar conditions;
   2) There were no reasonably feasible alternatives for the discharge, such as onsite retention of untreated wastewater, reduction of I/I, and the use of adequate backup equipment;
   3) The Permittee submitted a claim to the Board's staff within 10 working days of the date of the discharge that the discharge meets the conditions of this provision. Additional information to substantiate such claim shall be submitted upon the request of Board staff; and
   4) The Permittee took all reasonable steps to stop, and mitigate the impact of the discharge within 24 hours after the Permittee became aware of the discharge.

d. *Discharges Caused by Other Factors.* The Permittee may establish an affirmative defense to an action brought for non-compliance if the Permittee establishes through properly signed, contemporaneous operating logs, or other relevant evidence that:
   1) The Permittee can identify the cause or likely cause of the discharge event;
   2) The discharge was exceptional, unintentional, temporary and caused by factors beyond the reasonable control of the Permittee;
   3) The discharge could not have been prevented by the exercise of reasonable control, such as proper management, operation and maintenance, adequate treatment facilities or collection system facilities or components, or preventative maintenance.
   4) The Permittee submitted a claim to the Board's staff within 10 working days of the date of the discharge that the discharge meets the conditions of this provision. Additional information to substantiate such claim shall be submitted upon the request of Board staff; and
   5) The Permittee took all reasonable steps to stop, and mitigate the impact of the discharge as soon as the Permittee became aware of the discharge.

e. *Burden of Proof.* In any enforcement proceeding, the Permittee has the burden to prove that the criteria in this section have been met."

44. Pg. 36, Provision VI.C.7.c. – <u>Notification Requirements</u>. This requirement goes beyond requirements of federal rules that only require 24 hour notification for "any non-compliance which may endanger health or the environment." This provision requires 24-hour notice for virtually an non-compliance. The City suggests the following changes:

> "In the event the Discharger does not comply or will be unable to comply for any reason, with any <u>discharge</u> prohibition or <u>effluent</u> limitation contained in this Order <u>for which non-</u>

compliance may endanger health or the environment, the Discharger shall notice the Regional Water Board…"

Alternatively, this Provision should be removed as duplicative of federal standard provisions at 40 C.F.R. §122.41(*I*)(6)(i), and Provision V.E. on page D-8 of Attachment D.

Request: Remove this paragraph as duplicative or amend as requested.

45. Pgs. 36-37, Provisions VII.A, B., D. and F. – Compliance Determination. These compliance determination sections are incorrect. The language in these provisions should not use "**will** be considered out of compliance" because that prejudges whether a violation has occurred, the phrase "may be considered" would be more accurate to reflect enforcement discretion and to reflect that there may be a defense to the exceedance, which would make it not a violation. A permit itself cannot make an enforcement determination, that should be left up to a decision making board after due process has been provided and a violation has been alleged. The paragraphs should merely reference how compliance will be measured as is done in paragraph F on page 38 of the Draft Permit. There it properly references how compliance will be ascertained, but does not prejudge whether or not a violation exists.

In addition, the parentheticals and statements about how many days or instances of non-compliance exist should be removed or amended to add the qualifier of "potentially." As an example, an exceedance of a monthly average limit would not necessary result in 30 or 31 violations. Under the State Water Board's policies related to enforcement of mandatory minimum penalties, this exceedance would NOT result in 31 days of violation, only one. Similarly, a single operational upset (SOU) would be just one violation, so this characterization is not accurate.

For the instantaneous minima and maxima, a question exists as to whether more than one violation can occur since both the Water Code at section 13385 and the Clean Water Act at section 1319 both discuss discharges in terms of "for each day" and "per day of violation." For these reasons, the finding of a violation for each sample taken is likely inaccurate.

Request: Change language deeming certain acts to be violations to discretionary language (e.g. will to may). Remove parenthetical language regarding number of days of non-compliance.

46. Pg. B-1. The discharge point 001 is shown incorrectly. The actual location is about 2,000 feet east of location shown on Page B-1.

47. Attachment D. To be consistent with the federal standard provisions, the requirements set forth in Attachment D should use the word "permittee" instead of "discharger." *See* 40 C.F.R. §122.41.

48. Pg. D-9, Provision VII.A. The provisions related to non-municipal facilities do not belong in a municipal POTW permit and should be removed.

49. Pg. E-3, Provision II, Table 1; Pg. E-4, Provision III.B. – The M-INFB monitoring location and INFB requirements should be removed as Leprino is not a co-permittee. In addition, the groundwater monitoring requirements should all be included in a separate WDRs related to discharges to land, not a federal NPDES permit.

50. Pg. E-3, Provision II, Table 1 – Monitoring location R-001 is specified as 5 miles upstream of the discharge point. The City cannot physically get past the rock dam that is 2-3 miles upstream of the discharge location. The 5 mile point would also put the monitoring location past the junction of the San Joaquin River and Old River. The City requests that this monitoring location be deleted.

51. Pg. E-4, Provision IV.A.1. The City requests that the language be changed so that the monitoring location M-001 is specified at the final effluent pump station.

52. Pg.E-5, Provision V.A.2. The City requests that Flow Through samples be added to ***Sample Types*** in this section.

53. Pg.E-5, Provision V.A.3. The City requests that this section be clarified to state that the City can use either fathead minnows or rainbow trout, and that the same species need not be used for the duration of the permit.

54. Pg. E-5, Provision V.A.4. Methods– Remove the last sentence in this section which reads "No pH adjustment may be made unless approved by the Executive Officer." This statement is contradicted in paragraph 6 of that same section when they say "The acute toxicity testing may be modified to eliminate ammonia-relate toxicity…" This is a contradiction because pH is one way to modify the test to eliminate ammonia-related toxicity.

55. Pg. E-7, Provision V.B.8.b. - Remove the language in parenthesis stating "(A retest is only required in the case if the test results do not exceed the monitoring trigger specified in the Special Provisions VI.2.a.iii)" since this is an incorrect citation, and since the City has requested above that the section referenced in this parenthetical should be removed (see item 38 above).

56. Pg.E-7, Provision V.B.7. The language in the parentheses should be removed. If the receiving stream is more toxic than the City's effluent, then the City would like the opportunity to illustrate that toxicity through the Chronic Toxicity test.

57. Pg. E-10, Provision VI.A.1. This section should be removed as the treatment ponds should be regulated under a separate WDRs. If maintained, the City comments on the footnote to the chart that states: "Standard minerals shall include all major cations and anions and include verification that the analysis is complete." The Regional Board has failed to specify a finite list to be included. In addition, the City notes that monitoring location P-002 is the pond currently leased by Leprino and should be deleted from the City's monitoring requirements as the City has no operational authority or control over that pond.

58. Pg. E-11, Provision VIII.A.1. The City is uncertain how to obtain information on the presence or absence of bottom deposits when the bottom of the River is rarely visible. For this reason, the City requests that this requirement be removed.

59. Pg. E-12, Provision IX.A.1. Monitoring location B-001 is not concretely defined. The City requests further clarification as to why a particular location is being specified.

60. Pg. E-13, Provision X.A.1. This requirement duplicates the Permit requirement at page 22, Provision VI.B. Such duplication is unnecessary and puts the permittee in jeopardy of violating the

same requirement numerous times. Since this cannot have been intended by the Regional Water Board, this duplicative requirement should be removed.

61. Pg. E-16, Provision X.D.2. The MRP requires a biosolids report within 90 days of the Order and then annually in January. However, the Draft Permit provides not justification for requiring the report within 90 days of the Order. The City has already submitted the annual biosolids report for 2005, and would prefer to incorporate any changes required by the new permit into the next annual report. Under Water Code section 13267(b), *inter alia*, the Regional Water Board must consider the need and burden for all monitoring reports. Considering that this information is already in an annual scheduled report, a duplicative requirement for another report 90 days after the effective date of the Permit is unnecessary and overly burdensome.

Request: Remove the language requiring a biosolids report within 90 days of the effective date of the Order.

62. Pg. E-20, Provision X.D.4.h. The MRP requires submission of a summary of the annual pretreatment budget, including the cost of pretreatment program functions and equipment purchases. The Regional Board should provide an explanation of the need for and assess the burden of providing such information as required by, *inter alia*, Water Code section 13267(b).

Time Schedule Order

The City has the following comments on and requests related to the redlined version of the Draft TSO:

1. TSO Pg. 1, Finding 2, and Pg. 5-6, Provision 1. – Temperature Receiving Water Limitation Compliance. The City will likely be pursuing an exception to the Thermal Plan requirements. In order to do this, the City requests that the work plan be due within 6 months of effective date and that the completed study be due four (4) years after start.

2. TSO Pg. 2, Finding 5, Interim Limits and Compliance Schedules. This finding acknowledges that the effluent limits for EC, MTBE, nitrate and nitrite are based on the implementation of the narrative chemical constituents objective, the effluent limits for manganese are based on the Basin Plan's allegedly "site-specific" objective (even though this objective mirrors the statewide MCL value and no evidence exists that this applies site-specifically for any reason to Old River), and the effluent limits for ammonia are based on the Basin Plan's narrative toxicity objective. Although these narrative objectives existed prior to 25 September 1995, the effluent limitations being proposed based on these objectives are new interpretations, thereby allowing for a ten-year compliance schedule to be included in the Permit instead of a separate time schedule order. *See* Paragraph 7 in the Permit comments above; *see also* Letter from U.S. EPA Region IX to Frances McChesney (Oct. 7, 1998)(authorizing compliance schedules in permits where based on newly interpreted objective or standard) attached as Exhibit P. For this reason, the interim limits and compliance schedules for EC, MTBE, nitrate, nitrite, manganese, and ammonia should be removed from the TSO and placed into the Permit. Failure to do so would equate to an unlawful amendment of the NPDES Permit without going through the public process for permit amendments. *See e.g.*, 40 C.F.R. Parts 122, 123 and 124.

3. TSO Pgs. 4-5, Findings 14-17, and Pgs. 7-8, Provisions 5-7 – Discharge to land requirements. See Paragraph 32 above. In addition, the City comments that these discharge to land provisions do not

belong in a Time Schedule Order related to an NPDES permit. These provisions should be included in separate WDRs for the City of Tracy or Leprino Foods Company.

4. TSO Pg. 5, Finding 19 – CEQA – It is not clear that the TSO is an enforcement order falling within the purview of 14 C.C.R. §15321(a)(2) as alleged in this finding. This TSO is not enforcing or revoking the permit, but merely providing a time schedule for compliance and interim requirements with which the City must comply within that time schedule period. Therefore, CEQA compliance is required.

5. TSO Pg. 6, Provision 2 – Ammonia, Nitrite and Nitrate Schedule. *See* Comments on Draft Permit related to ammonia and nitrogen. For the reasons provided above, the interim limits and compliance schedules for nitrate, nitrite, and ammonia should be removed from the TSO and placed into the Permit.

6. TSO Pg. 6, Provision 3 – EC, Manganese and MTBE Schedule. *See* Comments on Draft Permit related to EC, manganese, and MTBE. For the reasons provided above, the interim limits and compliance schedules for EC, MTBE, and manganese should be removed from the TSO and placed into the Permit.

7. TSO Pg. 7, Provision 4 – Interim Limits. These interim limits should be placed in the Permit and should be set as monthly average limits since no impracticability analysis has been performed to justify a limit other than a monthly or weekly average, and because these are nearly all (except ammonia) based on human health objectives requiring 70 years of exposure and 2 liters a day of consumption values, neither of which are supported by the evidence in the record for this TSO. Furthermore, all of the time schedules should be for ten years, not 2 ½ years as proposed for ammonia, nitrate and nitrite, and just over five years for the remaining constituents. The TSO provides no justification for these shorter time periods.

8. TSO, Pg. 8, Provision 6 – Groundwater Requirements. The TSO prohibits any increase in mass loading of salt discharged to the treatment ponds. Insufficient evidence has been provided to justify such a prohibition. Furthermore, there is no evidence that mass is a concern related to EC. In addition, the TSO requires remediation of existing groundwater impacts, yet fails to provide proof of such impacts and if such impacts exist that these impacts were caused by the City, fails to specify what constituents require remediation, and fails to specify levels to which remediation must be made. These failures make this requirement too vague to be enforceable.